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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN MARLIN FOSTER

and

VIRGINIA SCRANTON FOSTER

Petitioners,

vs.

G. D. MILLIKEN, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Kentucky

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QUESTIONS PRESENTED FOR REVIEW

Whether the decisions and orders entered in the Kentucky Court of first instance, the appellate court, and the court of last resort, deprive the petitioners of their constitutional right to due process by denying the following:

(i) Trial by jury;

(ii) Notice of the pendency of the action.

(iii) Request to be represented by counsel in the action;

(iv) That the decision should not be based upon a document that is not valid;

(v) Due process when being deprived of property;

(vi) Access to the courts at a meaningful time and in a meaningful manner;

(vii) The benefits of appellate review; which requires a reversing of the Orders and provisions for a trial by jury by a decision in this Court.

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To the Supreme Court of Kentucky

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioners, John Marlin Foster and Virginia Scranton Foster, respectfully pray

that a Writ of Certiorari issue to review the order entered in the Supreme Court of Kentucky on 22 March, 1988, and all of the federal questions raised in that court; in the appellate court; and in the court of first instance.

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OPINION BELOW

The Supreme Court of Kentucky entered its order denying motion for discretionary review on 22 March 1988. A copy of the order is attached as Appendix A.

The Court of Appeals of Kentucky had entered its order on 21 January 1988 (App. B) denying motion for reconsideration of the Court's order entered on 16 November 1987 (App. J) which dismissed the appeal of the order filed 25 August 1987 (App. C) and the order filed 18 September 1987 (App. D) in Allen Circuit Court of Kentucky, which deny the petitioners of property.

JURISDICTION

On 22 March 1988 the Supreme Court of Kentucky entered its order to deny

discretionary review of the case (App. A). On 21 January 1988 the Court of Appeals entered its order to deny the motion for reconsideration of the order to dismiss the appeal (App. B). The jurisdiction of this Court is invoked under Title 28, United States Code 219, Section 1257 (App. E) and under 268 Federal Reporter 2d, 928, Note 3, A. E. Deloach v. Chandler Rogers and Mark Dukes, United States Court of Appeals, Fifth Circuit, July 30, 1959. "Every question arising under United States Constitution may, if properly raised in state court, come ultimately to Supreme Court of United States for decision" (App. F).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> Nor shall any person. . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment XIV:

> Nor shall any State deprive any person of life, liberty, or property without due process of law. . . .

United States Constitution, Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

STATEMENT OF THE CASE

On 1 February 1988, the petitioners filed a motion for Discretionary Review in the Supreme Court of Kentucky (App. G).

The motion raises federal questions relevant to the Constitutional rights of the petitioners on five issues as follows:

(i) The validity of the

respondent's document; ASSERTATION OF LIEN FOR REASONABLE ATTORNEY FEE PURSUANT TO KRS 376.460 (App. H) and the validity of the Order (App. C) which deprives the petitioners of property and is based upon that document; thus being entered without due process;

(ii) The right to trial by jury on the merits of the assertion of lien;

(iii) The trial brought by that action being conducted without notice of the pendency of the action;

(iv) The right to the benefits of appellate review;

(v) The right to access to the courts at a meaningful time and in a meaningful manner.

Quotations from the motion will show the raising of the federal questions; and their relation to the rights involved.

From page 3 relating to the validity of the assertion of lien (ii) follows: "For the respondent's assertion of lien pursuant to KRS 376.460 to be a valid instrument at least one of three conditions would have to be extant: (a) that the fee agreed upon by the parties had not been paid; or (b) that there had been a contingency fee agreement; or (c) that there had been no fee agreed upon by the parties. Not one of these three conditions existed. The fee agreed upon by the parties was $2,500.00 plus $250.00 for anticipated expenses, all of which was paid at the time of employment. That was for the entire case. After he was dismissed for reasons of his conduct, another lawyer was paid $2,000.00 to handle the critical part of the case; the placing of the award for damages

issue before the jury.

It is evident the trial court did not have jurisdiction to order a transfer of funds from the movants' jury damages award to the respondent based on his invalid assertion of lien . . . ."

This is an issue of fact for the appraisal of a jury.

From page 6, third paragraph; a quotation relevant to the right to trial by jury and the right to notice of the action follows: "The order which was filed on July 14, 1987, shows clearly that the only issue to be considered on August 18, 1987, was my motion for a jury trial on the lien issue. . . ."

The question of the right to notice of the pendency of the action is shown by continuing the quotation as follows: ". . . after denying my motion for a jury trial on the lien issue, the Judge

went right into the trial on that issue over my objections that this trial had not been scheduled for that date. That was a clear violation of the Constitutional requirement for due process of law. And the Order which followed and was filed on August 25, 1987 clearly violates the due process of law clause of Article V of the Bill of Rights."

Both the questions of the right to appellate review and the right to access to the courts are raised on pages 2 and 7 as follows: "The assertion of lien pursuant to KRS 376.460 was filed by the respondent as a part of Civil Action No. 84-CI-032. Because of that, the movants used the caption for that case as the caption for the notice of appeal. A second reason that the name G. D. Milliken, Jr. was not stated was that

the names of all parties affected by the appeal were stated in the content of the trial court orders which were named in the notice of appeal as being appealed. This evidently satisfies the purpose of CR 73.03 (App. I) to identify the affected parties. The acceptance of the motion dated November 20, 1987 (App. K) would satisfy the technical elements."

From page 7,. "The paramount concern of the movants is that a motion to dismiss the appeal based on a readily correctable technical oversight of a court rule - which did no harm to the respondent's right to due process of law - that the approval of this motion not be permitted to do the extremely serious harm to the Constitutional rights of the movants by disrupting the system of justice and denying them due process of law."

United States Constitution, Amendment V, Note 30

> Access to courts - "The right to petition the government for a redress of grievances includes the right of access to the courts; that right is also subject to due process protection in that the opportunity must be at a meaningful time and in a meaningful manner. Matter of N.C. Trading, 1978, 586 F.2d 221, 66 CCPa. 11."

"For the foregoing reasons the movants respectfully move the Court for a discretionary review of the Order (App. B) which was entered on January 21, 1988 which relates to the motion to reconsider the Order (App. K) which was entered on November 16, 1987."

The way in which the Supreme Court of Kentucky passed upon the five federal questions is stated by the ORDER DENYING MOTION FOR DISCRETIONARY REVIEW (App. A) which was entered on March 22, 1988.

On November 20, 1987, the petitioners-appellants filed a motion

(App. K) to reconsider the Order (App. J) to dismiss the appeal so as to permit a correction of the alleged technical oversight of a provision of Kentucky Court Rule 73.03 (App. I) by providing a supplementary caption (App. L) to be associated with the original caption (App. M) of the notice of appeal thus permitting the appeal to be processed.

The federal question of due process is stressed throughout the unintentionally repetitive 9-page motion. Quotations from the motion are as follows (page 2): "It appears that the preparers of the Court Rules intended to make provisions for correcting an excusable, purely technical oversight, as by Rule 6.02, so that a litigant could be prevented from using that as a means to disrupt the central purpose of our system of

justice.

The central issue of our appeal - the matter of Mr. Milliken's being in possession of $1,250.00 of the appellants' private funds by a process which does not conform to the established concepts of law, justice, the court rules, and court ruling precedent - involves not only the Kentucky state laws and system of justice, but also the provisions of the United States Constitution; the Bill of Rights in particular. The immediate concern of the appellants is for the necessary action to be taken which will permit them to make the necessary technical correction so that the appellate court can proceed with the necessary process of granting complete relief without the burden of appealing to a higher court. The pursuit of the

correct process of obtaining justice, through our system of justice under the law is the central concern of the appellants."

The Court of Appeals of Kentucky passed upon the federal question of due process by entering the Order to deny the motion (App. B).

At the time the order to dismiss was entered the Court had the appellant's Civil Appeal Prehearing Statement which stated the names of the Appellants and the Appellee (App. EE). Mr. Milliken had been mailed a copy of that document and a copy of the notice of appeal. He also had demonstrated his knowledge that he was the appellee by the timely filing of his Civil Appeal Prehearing Statement (App. N). Therefore, both the appellee and the Court had all of the knowledge to

satisfy the purpose of CR 73.03. It follows that when the purpose of a court rule is satisfied there is no cause to disrupt due process on a pure technicality related to the court rule. And the disruption of due process is compounded when a motion to correct the alleged technical deficiency is denied.

As required by the order dated July 7, 1987 (App. O), the petitioners and the respondent appeared in court on August 18, 1987 "for argument on the motion for a jury trial" as provided by the order. Much justification for a trial by jury is provided by the respondent and the Court in the following.

In his effort to avoid a jury trial the respondent brought to the hearing the Labach v. Hampton appeal in Court of Appeals of Kentucky, 1979, 585, SW, 2d,

434 (App. P). The situation in that case had no resemblance to the situation in our case. In that appeal the appellate court accepted the trial court's decision to deny a jury trial because no issues of fact were involved. The issue was to decide how the agreed upon by the parties contingency fee money should be divided between the lawyers, none of whom were paid an agreed upon fee when employed.

Whereas in our situation there was a fee agreed upon by the parties which was paid in full at the time of employment. And there was no contingency fee arrangement of any kind ever even mentioned.

The issue upon which the trial court's judgment was reversed; that it was erroneous for the trial court to place a value upon the legal services

rendered by counsel to his client; is exactly what the trial court in our situation proceeded to do.

The evident appellate court reasoning in the LaBach situation was that it was erroneous for the trial court to place a value upon the lawyer's legal services to his client because there were agreed upon contingency fees.

Whereas the logical reasoning in our situation is that it is erroneous because there was a fee agreed upon by the parties which was paid in full; and there was no contingency fee arrangement of any kind.

The manner in our trial in which the Court confused our situation with the entirely different situation in the LaBach case is quoted from page 15 of the transcript as follows: "In this case the Court of Appeals of Kentucky,

now the Supreme Court of Kentucky, has decided an issue of this nature and has decided that it is an equitable matter to be decided by the Judge and not by the jury" (App. Q).

But the "equitable matter" in that case was not to determine the relevant facts upon which to base the amount of the lawyer's fee, but to decide how the agreed upon fee money was to be divided "equitably" between the lawyers.

In relation to the right to trial by jury, the action brought by the respondent for reasonable attorney fee necessarily involves the fee agreed upon by the parties which was paid at the time he was employed as counsel of record in a condemnation suit brought by the Kentucky Department of Highways, plaintiff v. John M. Foster and Virginia S. Foster, defendants; for road right-

of way land owned by the defendants.

In the action he has brought, due process would permit the petitioners to place before a jury, which traditionally is the trier of fact, the many issues of fact available in letters and in documents in the court record of the condemnation case, Civil Action No. 84-CI-032 in which this action was brought, which can show to the jury that the respondent - in the absence of undivided fidelity to his clients - and in collusion with the attorney for the plaintiff, entered into a conspiracy to subvert justice for his clients by attempting to allow the plaintiff to avoid making "an appropriate amendment" to the survey of the defendants' road right-of-way land in the proposed deed, to the Commonwealth of Kentucky, contained in the Petition brought by the

plaintiff. That he opposed his clients' efforts for a year and a half until they finally persuaded the plaintiff to adopt the appropriate amendment to its original petition. That, with his cooperation instead of opposition, the plaintiff could have been caused to adopt the amendment within a few weeks instead of a year and a half.

At the base of that conduct was his discovery that counsel for the plaintiff had written right-of-way deeds for two adjoining landowners, both of which contained some of the defendants' land which was being condemned. The proper correcting of this would require the amending of the two recorded right-of-way deeds, as well as the proposed deed from the defendants. Hence the conspiracy to avoid making any amendment to any deed.

But when counsel was employed he was provided a copy of the Interlocutory Order and Judgment which was entered in the condemnation hearing on May 17, 1984. The second paragraph provides for "an appropriate amendment" to the plaintiffs' Petition (App. R).

When he was employed he was told that achieving this amendment to the plaintiff's Petition would be the first priority. Then, and only then, he would place the right-of-way damages issue before the jury. At the time the agreed upon fee of $2,750.00 total was paid he had labeled it a double-barreled case. When the amended petition finally was filed in the Court Record on June 17, 1986, he was dismissed because he had shown a great deal less than undivided fidelity to the interests of his clients for a year and a half.

A third lawyer was paid an additional $2,000.00 for placing the damages issue before the jury; which the respondent also had been paid to do. This third lawyer refused to mail the check for the damages awarded by the jury to the court clerk. Instead he demanded that he bring the check to the clerk's office to divide the money between him and his clients. But he had been paid his fee by written agreement in full. Because of his conduct he was dismissed; after which he did mail the check to the clerk. After that the Court ordered the clerk to award more than half of it to the respondent as an additional fee above his agreed upon fee which was paid in full.

The first counsel had shown less than undivided fidelity to his clients by deliberately going to the

condemnation hearing alone without advising his clients of the time and place of the hearing. He caused a false statement to be placed into the court record relating to the property boundary issue. He did not file exceptions as instructed to do; and he had the commissioner appraisers' damages check made payable to himself. For that conduct he was dismissed.

This relates to the Court's statement; while denying time to employ counsel for the trial conducted without notice; that I had fired three lawyers. This statement is recorded on page 18 of the transcript (App. S).

There is a strong indication that the respondent recognized that his assertion of lien is not a valid document under the circumstances that existed and under the provisions of KRS

376.460; and therefore not a document upon which a valid order could be based, to deprive the petitioners of property to pay him an additional fee. This is shown by his entering a totally false statement in court; which, if true, could bring his document under the provisions of KRS 376.460; and also make it compare with the situation in the LaBach case (App. P) which he presented. His false statement, and variations on it, is recorded on page 8 and 9 of the transcript (App. T) as follows:

". . . we had an agreed fee, Judge, of $2,500.00 retainer, plus $250.00 estimated expenses, and one-third of the amount of recovery over and above the amount which had been offered to him before I got into this case, . . ."

That "and one-third of the amount" part of his statement is totally false.

Then on page 9, a question by the Court: ". . . What was your fee, what was your claim of total fee to which you were entitled? And the answer:

"Judge, one-third of the amount of the recovery over and above what he had been offered at the time I got into the case."

That was saying that a contingency fee was to be his only fee just as in the LaBach case. But he already had acknowledge that he had been paid ". . . an agreed fee, Judge, of . . ."

This is strongly related to the right to a trial by jury.

On page 11 (App. U) is the petitioner's response: "This one-third thing that he mentioned in addition to the $2,750.00 which I paid him, this is the first I have ever heard of that. There was no understanding of that kind

at any time, verbal, written or any other kind." At which he interrupted as if by plan:

"Judge, in response to that I would be very glad to have this case decided on the quantum meruit situation. Very happy to do it that way."

That is the way the Court proceeded. But the action was brought pursuant to KRS 376.460 (App. V). The only condition for quantum meruit under the provision of that law would be the absence of a fee agreed upon by the parties. A fee agreed upon by the parties plus a contingency fee arrangement would eliminate the quantum meruit situation. The respondent had acknowledged that there was a fee agreed upon by the parties. If the Court accepted the false contingency fee statement as being a true statement,

then the proceeding would have to be on the contingency fee basis. Whereas if the contingency fee statement were eliminated by the Court for procedural purposes; and with an agreed upon fee in place; the proceeding based upon quantum meruit is not valid by the very provisions of KRS 376.460. So that the order, in the action as brought, and based upon quantum meruit to arrive at the amount of the fee, could not be a valid order and therefore was entered without due process. This would be the correct conclusion whether or not the contingency fee statement were true or false, by the very provision of KRS 376.460 and with an agreed upon fee that had been paid. The final order must conform to the provisions of the law under which the action was brought if it is to conform to due process.

The second federal question raised by the petitioners was the issue of notice of the pendency of the action. The order which was dated July 7, 1987 (App. O) gives notice for only one issue - for passing upon the petitioners' motion for a jury trial to be ruled upon at a hearing scheduled for August 18, 1987. But at that session; after denying the motion for a jury trial, the Court went directly into the action upon the merits of the respondent's assertion of lien. The petitioners were totally surprised and unprepared for this.

A quotation from U.S.C.A., Constitution, Amend. 5, 537, Due Process, Note 67, Notice, is as follows: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably

calculated, under all the circumstances, to apprise interested parties of pendency of the action and afford them an opportunity to present their objections, and if, with due regard for practicalities and peculiarities of the case, these conditions are reasonably met constitutional requirements are satisfied. Potter v. Castle Const. Co., C.A. Tex. 1966, 355 F.2d 212" (App. W).

A third federal question; the right to be represented by counsel, along with the right to notice is recorded on pages 17 and 18 of the transcript (App. X) from which is quoted as follows:

MR. FOSTER: My understanding from what you said in the beginning was that the only consideration today would be whether there would be a jury trial on it.

THE COURT: That was the first

question to be decided, yes, sir. That is correct, and I have decided that question.

MR. FOSTER: It was my understanding that that was the only procedure today.

THE COURT: No, this is the second hearing. . . . Do you have any reason why I should not proceed on the merits of this case today?

MR. FOSTER: I wish to be represented by counsel on the merits of the case, Your Honor. I thought the only issue today was whether I would get a jury trial, then I could employ counsel to present it to a jury.

THE COURT: Well counsel is one of the reasons we are here this morning. Now Mr. Foster, you have had three lawyers in this case. . . . So we have had three lawyers that have represented

you, and you have fired three of them. The case itself has been concluded by a judgment that is no longer subject to appeal, and we have this final issue resting here to be decided. I am going to decide it this morning.

That is the way in which the Court passed upon both the question of the right to notice, and the question of the right to be represented by counsel; in addition to the right to trial by jury.

From page 12 of the order (App. C) which was filed August 25, 1987, is quoted as follows: ACCORDINGLY, IT IS ORDERED that the Clerk, Allen Circuit Court, from the funds which are held on file in that office that have been received in this case as final payment shall pay to G. D. Milliken, Jr., attorney at law, the additional fee sum of $1,250.00. The remainder of the

funds, ($1,109.56) in possession of the Clerk for this case shall be paid to John M. Foster and Virginia Foster.

Before being notified that the final Order had been entered or filed, a motion (App. Y) to dismiss the lien litigation was filed on August 26, 1987. After receiving notice, a First Amended Motion was filed to set aside the final Order which deprived the petitioners of property. This motion (App. Z) stressed the federal question that the final Order is based upon the respondent's invalid document and therefore also is a document that is not valid.

The Court passed upon the question by entering the final Order (App. AA) to deny the motion.

It was very disappointing to learn later that the hearing on September 15, 1987, had not been recorded. The

petitioners had assumed that the proceedings were being recorded since the court reporter was in her chair on the stand just as she had been at the hearing and trial on August 18, 1987, which was recorded.

Because of financial realities; yet conscious of the right to the benefits of appellate review in civil actions; the petitioners proceeded without counsel and filed a notice of appeal of the order which was filed in the court record on August 25, 1987 and the order which was filed on September 18, 1987. The notice of appeal was delivered to the clerk, Allen Circuit Court, on September 22, 1987 (App. M).

The dismissing of the appeal and the denying of the benefits of appellate review are stated in the foregoing pages.

REASON FOR GRANTING THE WRIT

Where petitioners have been deprived of their rights to trial by jury; to due access to the courts; to the benefits of appellate review; and deprived of property without due process of law by orders entered in the state court of first instance, the appellate court, and the court of last resort, due process demands that the orders be reversed and the right to trial by jury be restored.

Support of the stated reason is presented as follows:

(i) The order entered in the Supreme Court of Kentucky to deny the motion for discretionary review (App. A) and the order entered in the Court of Appeals of Kentucky (App. B) to deny the motion (App. K) to allow a correction of an alleged deficiency in the notice of

appeal, deprive the petitioners of their right to the benefits of appellate review, which constitute a depriving of the right to due process.

(ii) In Allen Circuit Court of Kentucky, the Court's proceeding in the session on August 18, 1987, with the trial on the respondent's assertion of lien pursuant to KRS 376.460, for which notice had not been given for that action on that date, constitutes a violation of the petitioners' right to notice of the pendency of that action on that date (App. W) which is required by due process.

(iii) Under the circumstances that existed - that there was a fee agreed upon by the parties which had been paid in full and that there was no contingency fee arrangement of any kind - the respondent's assertion of lien

pursuant to KRS 376.460 was not a valid document under the provisions of that law. For that reason he did not have a valid case to bring as a part of Civil Action No. 84-CI-032. For the same reasons the order, which deprived the petitioners of property, is not a valid document because it is based upon that document which is not valid. Because of this, among other reasons, the order was entered without due process.

It is evident that the respondent recognized that his assertion of lien pursuant to KRS 376.460 is not a valid document, by his making a totally false statement in court (App. T) and repeating it in his Civil Appeal Prehearing Statement (App. N) that he had a contingency fee arrangement with his clients, the petitioners. Evidently he recognized that this false statement

would have to be accepted as a true statement for his assertion of lien to be a valid document. That is why the petitioners presented affidavits (App. CC & DD) and stated while under oath in the hearing on September 15, 1987, that the statement made by the respondent that he had a contingency fee arrangement was a false statement.

(iv) Because the petitioners had been deprived of their right to notice (App. W) of the pendency of the trial on the merits of the assertion of lien issue on August 18, 1987, they were unprepared to properly present their objections. This also is a reason why the final order (App. C) in that action, which deprived the petitioners of property, was entered without due process.

(v) The Court proceeded upon the

quantum meruit principle. For that to be valid when applied to the respondent's assertion of lien pursuant to KRS 376.460 (App. H), there would have had to have been the absence of any fee agreed upon by the parties. But there was a fee agreed upon by the parties which had been paid in full. Consequently, (a) The assertion of lien is not a valid document under the provisions of KRS 376.460; (b) There was no valid action which could have been brought as a part of Civil Action No. 84-CI-032; (c) The final order which deprives the petitioners of property is not valid because: (1) it is based upon a document which is not valid; and (2) it was entered in an action which is not a valid part of Civil Action No. 84-CI-032.

Because of these reasons the final

order was entered without due process.

The most important reason for granting the writ is the impact that this Court's decision can have on the people's much expressed concern about the trial court proceedings of this nature and the guidance it can provide for the future.

The disposition, as justice requires, for the petitioners is a reversal of the orders which have deprived them of property without due process, and a restoring of the right to trial by jury.

CONCLUSION

For the foregoing reasons, petitioners, John M. Foster and Virginia S. Foster, respectfully request a writ of certiorari issue to review the orders and decisions entered in the Supreme Court of Kentucky, the Court of Appeals

of Kentucky, and Allen Circuit Court of Kentucky which have resulted in depriving the petitioners of property without due process, and of their right to trial by jury.

Respectfully submitted,

Dated: July 22, 1988

John M. Foster
FOR PETITIONERS

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

JOHN MARLIN FOSTER, and
VIRGINIA SCRANTON FOSTER

PETITIONERS,

V.

G. D. MILLIKEN, JR.

RESPONDENT.

AFFIDAVIT OF SERVICE

STATE OF KENTUCKY)
) s.s.:
COUNTY OF ALLEN)

JOHN M. FOSTER, after being duly sworn, disposes and says that pursuant to Rule 28.5(c) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF

KENTUCKY on the Respondent by enclosing 3 copies thereof in an envelope, first class postage prepaid, addressed to:

G. D. Milliken, Jr.
P. O. Box 1929
Bowling Green, Kentucky 42101

and depositing same in the United States mail at Scottsville, Kentucky on July 22, 1988.

John M. Foster
JOHN M. FOSTER, Affiant

Subscribed and Sworn to Before Me this 22 day of July, 1988.

Commission Expires

Notary Public in and For Said County and State

A P P E N D I X

SUPREME COURT OF KENTUCKY

87-SC-79-D
(87-CA-2067-MR)

JOHN M. FOSTER and VIRGINIA S. FOSTER — MOVANTS

V. — ALLEN CIRCUIT COURT #84-CI-032

G. D. MILLIKEN, JR. — RESPONDENT

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED March 22, 1988.

Robert F. Stephens

Chief Justice

APPENDIX A

IN THE

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 87-CA-2067-MR

JOHN M. FOSTER, ET AL. APPELLANTS

V. APPEAL FROM ALLEN CIRCUIT COURT
ACTION NO. 84-CI-000032

TRANSPORTATION CABINET,
COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS APPELLEES

* * * * * * * * * *

ORDER

BEFORE: LESTER, CLAYTON AND COOPER, JUDGES.

This Court, having considered the motion for reconsideration of this Court's order, entered November 16, 1987, dismissing the above-styled appeal, the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: January 21, 1988

Charles R. Lester
JUDGE, COURT OF APPEALS

APPENDIX B

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. ORDER

JOHN FOSTER and
wife, VIRGINIA FOSTER DEFENDANTS

This matter came on duly to be heard pursuant to an Order issued by this Court on July 7, 1987, where the matter of lien for attorney's fees pursuant to KRS 367.460 was originally considered.

Hearings with relation to this case are necessary in that the cause of action related hereto was disposed of and a check and payment of the difference between the amount previously

paid by the plaintiff to defendant and the amount found in favor of the defendant by the jury in a trial of this case upon its merits was tendered to counsel for the defendants and that attorney forwarded the same to this Court. By Order of June 25, 1987, the Court ordered that attorney, G. D. Milliken, Jr., and the defendants, John Foster and Virginia Foster to appear for the purpose of determining the disposition of the lien for attorney's fees filed by Mr. Milliken.

Defendants move the Court to reconsider that Order and further file with the Court a lengthy statement in response to the itemized statement of services that has been filed with the lien for attorney's fees by Mr. Milliken

Mr. Milliken claims to have

expended 144 hours and 45 minutes representing the defendants to this case during the period December 1984 to July 1986. Mr. Milliken advises the Court that he agreed to represent the defendants for a retainer fee of $2,500.00 plus an advance cost deposit of $250.00, with the balance of his fee to be determined by an amount that would be computed as one-third of the amount recovered above the amount offered by the plaintiff. Defendants dispute the claim "one-third above the amount offered by the plaintiff." Defendants further state many things in their response to the itemized statement that randomly address a variety of matters outside the scope of this case as well as addressing some matters within the scope of this case. Defendants have

been variously represented by attorneys of their own selection with Mr. David Patrick of Harrodsburg, Kentucky representing them until December 1984, at which time the defendants released him from this case. Defendants then hired Mr. Milliken who remained counsel of record until July 1986, at which time Mr. Milliken was released of record. Thereafter and throughout the trial of this case and the post-trial matters pertaining hereto the defendants have variously acted by John M. Foster, acting pro-se, as counsel for the defendants. He has prepared and filed a variety of pleadings styled in this case and written in his own handwriting which are filed of record in this matter. However, prior to the trial of this case before a jury on April 20, 1987, he

obtained the services of Mr. Robert M. Alexander, an attorney from Glasgow, Kentucky, who represented the defendants during both pre-trial matters and in the trial of the issues involved in this case. After the trial was completed, in a pleading that was filed with the Clerk of Court on June 22, 1987, John M. Foster, acting pro-se for the defendants, notified the Court that Robert M. Alexander was dismissed as their attorney and would take no further action as counsel for the defendants effective the 22nd day of June, 1987. Since that time Mr. John M. Foster, acting pro-se, has filed the matters which the defendants desired to be considered by this Court.

When this case was called for a hearing on the issues of the lien for

attorney's fees filed by Mr. Milliken, said hearing taking place on July 7, 1987, Mr. Foster moved the Court that this matter be tried before a jury and further moved the Court that a continuance be granted in order that he could research and present the Court with authority that a jury trial is required in order to determine the question of attorney's fees in cases of this nature. Mr. Foster, continuing to act pro-se, filed a variety of handwritten documents relating to citations from American jurisprudence and in general stating the position of the defendants with relation to the claim of Mr. Milliken. In addition, Mr. Foster filed documents in which he expressed the position of the defendants with relation to affidavits by Mr. Kelly

Powell and Mr. James Secrest, Sr., who had executed affidavits with relation to reasonable hourly charges for performance of the duties of the nature as described by Mr. Milliken in his affidavit. Mr. Foster objected to these affidavits and insisted that he had a right for this matter to be determined by a jury.

The Court first turned to the issue of whether a jury trial is required in determining attorney's fees involved in legal work. It is noted that in this case the defendants have been represented by three different attorneys, all of whom have been released of record by the defendants and that John M. Foster, acting pro-se, has filed numerous documents during the pendency of this matter and since the

trial of this matter, acting pro-se for himself and his wife, the other defendant herein.

Under these circumstances the Court finds that the proper nature for allowance of a fee to an attorney who is employed under a contingent contract, but discharged before completion of the contract would be the contract fee less reasonable costs of services of other attorneys required to complete the contract. It is disputed here whether Mr. Milliken was employed on a contingent fee as claimed by him but which is disputed by the defendants. Under the circumstances of this case and the disparity of the claims by the attorney and the defendants the Court finds it impossible to determine the disposition of the final payment of the

defendants' recovery which is being held by order of this Court by the Clerk of Court until a determination as to the award of fees to attorney Milliken is determined.

In order to determine this matter the Court must necessarily fix a value of reasonably necessary services rendered by attorney Milliken and it is the finding of this Court that this is an equitable matter in which the Judge sitting without the intervention of a jury is in a much better position to make such determination of disposition between the parties. Accordingly, motion by the defendants for this matter to be tried before a jury was denied.

The Court then proceeded to hear the defendants who essentially recited the substance of the documents filed by

Mr. Foster and then heard attorney Milliken as to the merits of his claim. The Court finds that the defendants have previously paid Mr. Milliken the sum of $2,500.00 as a retainer fee and $250.00 toward the cost of this case. The attorney advocates that his services upon an hourly basis would make a return to him of $50.00 per hour as a reasonable charge for services and this sum is supported by the affidavits of members of the bar of the city of Scottsville, county seat of the county where this matter was tried. Inasmuch as the jury returned a verdict in favor of the defendants for $30,000.00, then a reasonable contingency fee would normally be $10,000.00, one-third of the recovery. However, attorney Milliken did not represent the defendants from

start to finish and would not be entitled to a one-third recovery fee for the efforts which he has expended. If Mr. Milliken is awarded $50.00 per hour expended for his services, then he would be entitled to recover $7,237.50. The court finds that amount of fees to be disproportionate to the work performed and recovery obtained under the facts of this particular case. The Court is of the opinion, which opinion is shared by attorney Milliken, that that amount of fees, if any to which attorney Milliken is entitled, should more appropriately be determined on a quantum merit basis by the Court. Considering the fact that the defendants either paid or are liable to attorney David Patrick for his services, and are liable to and have paid attorney Robert Alexander for his

services, and in addition to attorney Milliken the defendants have acted as their own attorney, pro-se, the Court finds that a quantum merit fee of $4,000.00 would be reasonable under the circumstances of this case.

Inasmuch as the defendants have paid Mr. Milliken $2,750.00 then Mr. Milliken in the judgment of this Court is entitled to recover an additional fee of $1,250.00 from the proceeds of the check now being held by the Clerk of the Allen Circuit Court. ACCORDINGLY, IT IS ORDERED that the Clerk, Allen Circuit Court, from the funds which are held on file in that office that have been received in this case as final payment shall pay to G. D. Milliken, Jr., attorney at law, the additional fee sum of $1,250.00. The remainder of the

ALLEN CIRCUIT COURT CASE NO. 84-CI-032 funds in possession of the Clerk for this case shall be paid to John M. Foster and Virginia Foster.

This is a final and appealable order with no just cause for delay.

ENTERED this 20th day of August, 1987.

Clyde M. Thomas

CLYDE M. THOMAS, JUDGE

cc: G. D. Milliken, Jr.
John & Virginia Foster

CERTIFICATION OF COURT RECORDS

I, Orel F. Meador, Clerk of the Allen Circuit/District Court, do certify that the foregoing are true and correct copy(s) of the original document(s) as recorded in my office.
In testimony whereof witness my hand as Clerk aforesaid, this the 26 day of Sept. 1987.

By: Mary West D.C.

And Last

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. ORDER

JOHN M. FOSTER, and wife
VIRGINIA FOSTER DEFENDANTS

In the above-styled case the Court entered an order on August 20, 1987, which was filed of record with the Circuit Court Clerk, Allen Circuit Court, on August 25, 1987, copy thereof to Attorney G. D. Milliken, Jr. and to John and Virginia Foster, defendants herein. In that judgment the Court ruled on the pending matter of a lien claim filed by Mr. Milliken against the defendants pursuant to KRS 376.460.

The defendants, acting pro-se, by John M. Foster on August 26, 1987, filed a motion for the Court to dismiss the lien litigation and to cause Attorney G. D. Milliken, Jr. to pay to the defendants the sum of $1,250.00, with interest thereon at the rate of 10.5% from the time he received these funds. Defendants apparently base their motion upon a claim that the monies previously paid to Mr. Milliken were for the entire fee in the handling of the case, and not a retainer fee of $2,500.00 and an advance for expenses of $250.00 as claimed by Mr. Milliken to be paid by the defendants on December 22, 1984.

On September 9, 1987, the defendants filed a document entitled "First Amended Motion" in which they first moved the Court to withdraw their

prior motion and in lieu thereof to substitute this amended motion. Defendants then went on to deny the right of Mr. Milliken to the fees which had been ordered by the Court in its prior order.

The Court withheld ruling on motion by Mr. Milliken that the amended motion be dismissed in that the same did not comply with the Rules of Civil Procedure. Further, by oral motion Mr. Milliken moved the Court to invoke sanctions against the defendants for frivolous actions that violate Civil Rule 11.

The Court has fully heard each of the defendants and has given careful consideration to their statements with relation to the claim for attorney's fees which are the subject of Mr.

Milliken's lien and claim. In that connection the record reveals that this is the first time that the defendants have claimed that the monies previously paid to Mr. Milliken were "in full." In their motion of July 22, 1987, filed of record with the Allen Circuit Court on July 23, 1987, the defendants alleged that the conduct of their former attorney constituted legal malpractice in that he did not pursue matters that the defendants perceived them to be, but instead engaged in meaningless work. They further stated that the case should have been resolved well within the range of a $2,500.00 fee plus $250.00 for expenses which was paid and that he had no further claim on their assets.

Considering all of these matters the Court finds that the question of

entitlement to attorney's fees was fully considered and ruled upon by the order of the Court dated August 20, 1987 which was a final and appealable order that was deposited with the Clerk of Court on August 25, 1987. Having fully considered and determined those matters at that time there is no basis in the present motions or amended motions filed by the defendants for this Court to withdraw, amend, or vacate its prior order and the Court so determines.

The Court has considered the claim of frivolous action under Civil Rule 11 in that the defendants are acting as their own attorney and subject to that rule but decline to impose any sanctions upon this matter at this time.

The motion and amended motion of the defendants is denied. This is a

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

final and appealable order with no just cause for delay.

ENTERED this 16th day of September, 1987.

Clyde M. Thomas

CLYDE M. THOMAS, JUDGE

A TRUE COPY
ATTEST: CAROL F. MEADOR, CLERK
BY: Bobbie Rutherford, D.C

And Last

The revised section omits the words of section 347 of Title 28, U.S.C., 1940 ed., "and with like effect as if the case had been brought there with unrestricted appeal", and the words of section 348 of such title "in the same manner as if it had been brought there by appeal". The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phraseology and arrangement.

RULES OF THE SUPREME COURT

Procedure generally on appeal, writ of certiorari, or certification of questions, see Appendix to this title.

Stays, see rule 44.

FEDERAL RULES OF CIVIL PROCEDURE

Power of appellate court to stay proceedings not limited by rule 62, see rule 62(g), Appendix to this title.

CROSS REFERENCES

Quorum of Supreme Court justices, see section 2109 of this title.

Review generally, see section 2101 et seq. of this title.

Review of appeals of orders of Secretary of Health and Human Services respecting approval of construction projects for State mental retardation facilities and community mental health centers, see section 2688 of Title 42, The Public Health and Welfare.

Review of appeals of orders relating to use of pesticide chemicals and raw agricultural commodities, see section 346a of Title 21, Food and Drugs.

Time for appeal or certiorari, see section 2101 of this title.

Vesting and liquidation of Bulgarian, Hungarian, and Rumanian property, final orders or decrees of district courts of the United States reviewable as provided in this section, see section 1631a of Title 22, Foreign Relations and Intercourse.

Writs, see section 1651 of this title.

SECTIONS REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2350 of this title; title 3 section 437g; title 5 section 1508, 7123; title 7 sections 136n, 194; title 12 sections 1464, 1730, 1730a, 1818; title 15 sections 31, 28, 45, 57a, 77i, 78aa, 79x, 80a-43, 80a-43, 80b-12, 687a, 687e, 717r, 1193, 1262, 1394, 1474, 1710, 1719, 1913, 2003, 2004, 2008, 2011, 2012, 2412; title 16 sections 794, 825l, 826g; title 19 sections 1614, 1970c-3, 1397, 1334d, 1416, 2309, 2740, 2751, 2805, 2863, 2872; title 21 sections 346a, 348, 385, 386, 371; title 22 section 1631a, 2740, 2831, 3066; title 23 section 131; title 28 sections 3310, 6363, 7482; title 29 section 304; title 30 sections 186, 218, 688, 887, 1478; title 39 section 816; title 31 section 6722; title 33 sections 906, 830, 992; title 38 section 784; title 40 section 722; title 42 sections 263a, 263f, 291h, 804, 1316, 1320a-9a, 3032, 3069f, 3027, 3414, 3788, 5311, 5406, 5407, 6905, 6906, 6912; title 45 section 153; title 47 section 402; title 49 App. sections 45, 1486, 1674b, 1675, 1677, 1678, 1254. Repealed. Pub. L. 97-164, title I, § 123, Apr. 2, 1982, 96 Stat. 36]

Section 1254, act June 25, 1948, ch. 646, 62 Stat. 928, authorized the Supreme Court to review cases in the Court of Claims by writ of certiorari and by certification of questions of law.

Section 1254, act June 25, 1948, ch. 646, 62 Stat. 928, authorized the Supreme Court to review cases in the Court of Customs and Patent Appeals by writ of certiorari.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch. 646, 62 Stat. 929; July 29, 1970, Pub. L. 91-358, title I, § 172(a)(1), 84 Stat. 590.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 344 (Mar. 3, 1911, ch. 231, §§ 236, 237, 36 Stat. 1156; Dec. 23, 1914, ch. 2, 38 Stat. 790; Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726; Feb. 17, 1922, ch. 54, 42 Stat. 366; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Provisions of section 344 of title 28, U.S.C., 1940 ed., relating to procedure for review of decisions of State courts are incorporated in section 2103 of this title. Other provisions of such section 344 of title 28, U.S.C., 1940 ed., are incorporated in section 2106 of this title.

The revised section applies in both civil and criminal cases. In *Twitchell v. Philadelphia*, 1868, 7 Wall. 321, 19 L.Ed. 223, it was expressly held that the provisions of section 25 of the Judiciary Act of 1789, 1 Stat. 85, on which title 28, U.S.C., 1940 ed., § 344, is based, applied to criminal cases, and many other Supreme Court decisions impliedly involve the same holding inasmuch as the Court has taken jurisdiction of criminal cases on appeal from State courts. See, for example, *Herndon v. Georgia*, 1935, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530 and *Asherafi v. Tennessee*, 1944, 64 S.Ct. 921, 323 U.S. 143, 89 L.Ed. 1162.

Provision, in section 344(b) of title 28, U.S.C., 1940 ed., for review and determination on certiorari "with the same power and authority and with like effect as if brought up by appeal" was omitted as unnecessary. The scope of review under this section is unrestricted.

Words "and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied," in said section 344(b), were omitted as surplusage.

The last sentence in said section 344(b) relating to the right to relief under both subsections of said section 344, was omitted as unnecessary.

Changes were made in phraseology.

JURISDICTION (1948)

APPENDIX E

A22

BEST AVA

sertedly finding it on the street. T[illegible] was no explanation as to how the five coils came to be on a roadway several blocks from the wharf after all 186 coils had been counted there. Only 181 coils were found on board the President Taylor after a careful search and count at Yokohama.

These facts, considered with other evidence in the case and apart from any evidence as to weight, would have warranted a jury finding that someone had made the 181 coils found at Yokohama into the 186 coils found at Kobe. Accordingly, the trial court did not err in denying the motion for judgment of acquittal.

The judgment is reversed and the cause is remanded with directions to grant appellant a new trial.

A. E. DELOACH, Appellant,

v.

Candler ROGERS and Mark Dukes (Dora S. Rogers as Administratrix of the estate of Candler Rogers, deceased, substituted as party appellee in place of Candler Rogers, deceased), Appellees.

No. 17665.

United States Court of Appeals
Fifth Circuit.

July 30, 1959.

Action brought against sheriff and his deputy, assertedly under civil rights statutes, upon assertions that defendants had beaten plaintiff and jailed him acting pursuant to a peace warrant improperly issued. The United States District Court for the Southern District of Georgia, Frank M. Scarlett, J., rendered judgment for defendants and plaintiff appealed. The Court of Appeals, Jones, Circuit Judge, held that complaint against sheriff and his deputy, alleging that, because plaintiff had been in controversy with county commissioners with reference to road building, on pretext that he was interfering with road, peace warrant was issued against plaintiff and that, on strength thereof, defendants beat plaintiff and took him to jail from which he was released on bond and that no charge was ever made against him alleged, at most, cause asserted by one citizen of state against other citizens of same state for false arrest and assault and battery and did not allege cause under Federal Civil Rights Act.

Affirmed.

1. Civil Rights ⇐13

Complaint against sheriff and his deputy, alleging that, because plaintiff had been in controversy with county commissioners with reference to road building, on pretext that he was interfering with building of road, peace warrant was issued against plaintiff and that, on strength thereof, defendants beat plaintiff and took him to jail from which he was released on bond and that no charge was ever made against him, alleged, at most, cause asserted by one citizen of state against other citizens of same state for false arrest and assault and battery and did not allege cause under Federal Civil Rights Act where it made no charge that plaintiff's treatment was based on discrimination. 28 U.S.C.A. § 1343.

2. Courts ⇐122(1)

Jurisdiction has not been conferred upon federal district courts for redress of every violation of rights guaranteed by United States Constitution.

3. Courts ⇐391(1)

Every question arising under United States Constitution may, if properly raised in state court, come ultimately to Supreme Court of United States for decision.

Aaron Kravitch, Savannah, Ga., for appellant.

Alex A. Lawrence, Savannah, Ga., for appellees.

ILABLE COPY

COMMONWEALTH OF KENTUCKY
SUPREME COURT

JOHN M. FOSTER
VIRGINIA S. FOSTER MOVANTS

V. MOTION FOR DISCRETIONARY REVIEW

G. D. MILLIKEN, JR. RESPONDENTS

Come the movants and move the Court for a discretionary review of the issues related to the appellate court order which was entered in January 21, 1988.

(a) The movants, John M. Foster and Virginia S. Foster, 5121 Gallatin Road, Scottsville, Kentucky, 42164, are not represented by counsel.

The respondent, G. D. Milliken, Jr., P. O. Box 1926, Bowling Green, Kentucky, who is a lawyer, is providing his own counsel.

(b) The date of entry of the order sought to be reviewed is January 21, 1988.

(c) No execution of a superdeseas bond, or bail has been made on appeal.

(d) (i) The assertion of lien pursuant to KRS 376.460 was filed by the respondent as a part of Civil Action No. 84-CI-032. Because of that, the movants used the caption for that case as the caption for the notice of appeal. A second reason that the name of G. D. Milliken, Jr. was not stated, was that the names of all parties affected by the appeal were stated in the content of the trial court orders which were named in the notice of appeal as being appealed.

This evidently satisfies the purpose of CR 73.03 to identify the affected parties. The acceptance of the motion dated November 20, 1987, would satisfy the technical elements.

A superlative relevance is that the technical oversight did no harm to the respondent. He has known from the beginning that he is a party affected by the appeal. He has been provided copies of all instruments filed by the movants.

A copy of the official transcript of the hearing on August 18, 1987, is being provided so that reference to it can be made.

(ii) For the respondent's assertion of lien pursuant to KRS 376.460 to be a valid instrument, at least one of three conditions would have to be extant: (a) That the fee agreed upon by the parties had not been paid,

or (b) That there had been a contingency fee agreement, or (c) That there had been no fee agreed upon by the parties. Not one of these three conditions existed. The fee agreed upon by the parties was $2,500.00 plus $250.00 for anticipated expenses, all of which was paid at the time of employment. That was the fee for the entire case. After he was dismissed for reasons of his conduct, another lawyer was paid $2,000.00 to handle the critical part of the case; the placing of the award for damages issue before the jury.

Evidently the trial court did not have jurisdiction to order a transfer of funds from the movants' jury damages award to the respondent based on his invalid assertion of lien. His statement about the agreed upon fee is recorded on page 8 of the official

transcript; a part of which state - ". . . and one-third of the amount of recovery . . . . - is totally false. That statement evidently was his attempt to make his assertion of lien valid and to make it conform to the court ruling precedent: LaBach v. Hampton, 585 S. W. 2d 434, which he brought to the court room to prevent a jury trial on his assertion of lien issue.

The ruling in that very case shows clearly that, with the circumstances in our situation, it was erroneous for him to ask the court to set a value on his legal services and erroneous for the court to do so. There certainly was a fee agreed upon by the parties which was paid in full. And there certainly was no contingency fee agreement of any kind; or even any discussion of any. He cannot produce one iota of evidence to

support his statement. My statement relating to this is found on page 11 of the transcript.

Also at the hearing on September 15, 1987, which resulted in the Order which was filed on September 18, 1987, the movants presented affidavits in support of my said statement on page 11. I was totally surprised to learn that no recording of that hearing was made even though the court reporter was present in her regular chair.

The order which was filed on July 14, 1987, shows clearly that the only issue to be considered on August 18, 1987, was my motion for a jury trial on the lien issue. But - as is shown on pages 17 and 18 of the transcript - after denying my motion for a jury trial on the lien issue, the Judge went right into the trial on that issue over my

objections that this trial had not been scheduled for that date.

That was a clear violation of the Constitutional requirement for due process of law. And the Order which followed and was filed on August 25, 1987, clearly violates the due process of law clause of Article V of the Bill of Rights.

(iii) The paramount concern of the movants is that a motion to dismiss the appeal based on a readily correctable technical oversight of a Court Rule - which did no harm to the respondent's right to due process of law -; that the approval of this motion not be permitted to do the extremely serious harm to the Constitutional rights of the movants by disrupting the system of justice and denying them due process of law.

For the foregoing reasons the

movants respectfully move the Court for a discretionary review of the issues related to the Order which was entered on January 21, 1988, which relates to the motion to reconsider the Order which was entered on November 16, 1987.

(e) A copy of the Order sought to be reviewed is being provided.

(f) The movant does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

(g) No other party to the proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

This the 1st day of February 1988.

John M. Foster
JOHN M. FOSTER
for Movants

CERTIFICATION

This is to certify that a copy of the foregoing is being placed in the U.S. Mail addressed to the respondent G. D. Milliken, Jr., P. O. Box 1926, Bowling Green, KY 42102.

This the 1st day of February 1988.

John M. Foster
for Movants

ALLEN CIRCUIT COURT

CIVIL ACTION NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. ASSERTATION OF LIEN FOR REASONABLE ATTORNEY FEE PURSUANT TO KRS 376.460

JOHN M. FOSTER
AND
VIRGINIA FOSTER DEFENDANTS

Comes G. D. Milliken, Jr. of the law firm of Milliken and Milliken and hereby asserts a lien on the proceeds of the claims of the defendants in the above styled case for reasonable attorney's fee pursuant to KRS 376.40 for services rendered to the defendants from December 1984 to the date of the motion to withdraw as counsel.

This July 15th, 1986.

MILLIKEN AND MILLIKEN
1039 College Street,
P.O.Box 1926,
Bowling Green, Ky 42101

ATTORNEYS OF RECORD FOR DEFENDANTS.

This is to certify that a copy of the foregoing was this day mailed to John M.F oster and Virginia Foster, 5121 Gallatin Road, Scottsville, Kentucky 42164 This July 10th,1986

APPENDIX H-2

(Amended effective July 1, 1976; amended effective November 10, 1976; amended October 14, 1977, effective January 1, 1978.)

Compiler's Notes. See Official Comment following CR 73.08.

Kentucky Bench & Bar. Woods, A Time Chart for Kentucky Appellate Practice, Vol. 43, No. 4, October 1979, Ky. Bench & Bar 13.

Kentucky Law Journal. Kentucky Law Survey: Cooper, Civil Procedure, 66 Ky. L.J. 531 (1977-1978).

Cited: Cobb v. Carpenter, 553 S.W.2d 290 (Ky. App. 1977).

NOTES TO DECISIONS

ANALYSIS

1. Nature of time limit.
2. Extension of time.
3. Suspending running of time.
5.1. Notice of appeal.
8. Statement of points relied upon.
15. Cross-appeal.

1. Nature of Time Limit.

The filing of a notice of appeal within the time limit prescribed by this rule is mandatory. United Bonding Ins. Co. v. Commonwealth (1970), 461 S. W. (2d) 535.

Where plaintiff's motion for a new trial was not filed in the trial court, her allegation being that the trial court overruled her motion for failure to file in time and before the appeal was taken, but was filed in the Court of Appeals, the motion was overruled on the grounds that it presented an issue which was not first presented in the trial court. Benningfield v. Dixon (1972), 482 S. W. (2d) 760.

2. Extension of Time.

A party may not resort to CR 60.02 to gain an additional extension of time to prevent the application of this rule. United Bonding Ins. Co. v. Commonwealth (1970), 461 S. W. (2d) 535.

3. Suspending Running of Time.

In any appealed case in which a motion was filed under CR 59 so as to terminate the running of the time for taking the appeal, the record should show the motion and the date on which it was overruled so that the Court of Appeals can be informed whether the notice of appeal was in time. Evans v. Commonwealth (1970), 450 S. W. (2d) 509.

5.1. Notice of Appeal.

Where the order appealed from was entered in circuit court July 13, 1970, with the record on appeal filed September 25, 1970, and the notice of appeal filed in circuit court July 29, 1970, but never filed in the Court of Appeals, the appeal was dismissed not only for untimely filing of the record but also for failure to follow the statutorily required procedure of filing the notice of appeal in the Court of Appeals. Luby v. Jackson (1970), 460 S. W. (2d) 827.

Where no notice of appeal from the order appealed from was filed in the circuit court, the appeal had to be dismissed. United Bonding Ins. Co. v. Commonwealth (1970), 461 S. W. (2d) 535.

8. Statement of Points Relied Upon.

Where an amended judgment was not complete in itself and was designed to clarify an omission, the failure of the appellants to specify the supplemental judgment in their statement of appeal was not fatal to the appeal. England v. Spalding (1970), 460 S. W. (2d) 4.

The argument that a no damage clause in the contract made an award for damages from the appellee to the appellant impermissible could not be considered on appeal where the appellee had not appealed the point nor moved to dismiss on appeal. Pipelines, Inc. v. Muhlenberg County Water Dist. (1971), 465 S. W. (2d) 927.

Where, in the trial court, the appellees unsuccessfully attacked the appellant's notice of appeal and did not appeal from that ruling nor move to dismiss on appeal, it was impermissible for them to argue in their brief that the appeal should not be considered. Pipelines, Inc. v. Muhlenberg County Water Dist. (1971), 465 S. W. (2d) 927.

15. Cross-Appeal.

The 20-day time limit fixed by RCA 1.080 (deleted) to file a cross-appeal must be strictly observed. Reed v. Reed (1969), 457 S.W.2d 4, cert. denied, 410 U.S. 931, 93 S. Ct. 1378, 35 L. Ed. 2d 594 (1973).

Rule 73.03. Notice of appeal.—The notice of appeal shall specify all the appellants and all the appellees; "et al." and "etc." are not proper designations of parties. The notice of appeal shall also designate the judgment or part thereof appealed from. The clerk shall serve notice of the filing of the notice of appeal by mailing a copy thereof to the clerk of the appellate court and to the attorney of record of each party other than the appellant, or, if a party is not represented by an attorney, then to the party at his last known address; but his failure to do so does not affect the validity of the appeal, and such notification

BEST AVA

sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note on each copy thus served the date on which the notice of appeal was filed, and shall note in the civil docket the names of the parties to whom he mails copies, with date of mailing. (Amended effective July 1, 1976; amended October 14, 1977, effective January 1, 1978.)

Compiler's Notes. See Official Comment following CR 73.08.

Kentucky Law Journal. Kentucky Law Survey: Cooper, Civil Procedure, 66 Ky. L.J. 531 (1977-1978).

Opinions of Attorney General. The Louisville Civil Service Board under KRS 15.190(6) and the Rules of Civil Procedure, rules 73.01, 73.02 and this rule can appeal a judgment from the lower court and under KRS 90.230 the city legislative body can appropriate funds necessary to make such appeal. OAG 78-257.

Cited: Benningfield v. Dixon (1972), 482 S. W. (2d) 760.

NOTES TO DECISIONS

Analysis

1. Specification of parties.
2. Designation of judgment.
2.1. —Appealable judgment.
2.2. —Failure to comply.
3. Strict compliance.
4. Motion to dismiss.
5. Workmen's compensation.
6. Notice of appeal.

1. Specification of Parties.

Amendment of this section too late to provide adequate notice of the new requirements was considered exigent circumstances sufficient to avoid dismissal of a suit in which the notice of appeal improperly used the phrase "et al." to refer to intervening plaintiffs who were indispensable parties to the suit. Yocom v. Franklin County Fiscal Court, 545 S.W.2d 296 (Ky. App. 1976).

If the notice of appeal designates the appellees in such a way that it is possible to determine who is entitled to prosecute a cross-appeal under CR 74, then the notice of appeal has satisfied the requirement that all appellees be specified. Yocom v. Franklin County Fiscal Court, 545 S.W.2d 296 (Ky. App. 1976).

Where notice of appeal specified the defendants as "Franklin County Fiscal Court, et al.," the notice sufficiently specified the fiscal court and all its members in their official capacities as appellees to the appeal and appeal should therefore not be dismissed for failure to comply with requirement that parties taking the appeal be specified. Yocom v. Franklin County Fiscal Court, 545 S.W.2d 296 (Ky. 1976).

A notice of appeal complies with this rule if an appellee is specifically named in the caption even though he is not explicitly designated as an appellee. Schulz v. Chadwell, 548 S.W.2d 181 (Ky. App. 1977).

As long as it conforms to the official form, a notice of appeal is not defective under this rule merely because the appellees are not specified in the body of the notice. Schulz v. Chadwell, 548 S.W. 2d 181 (Ky. App. 1977).

In the absence of any specific designation using the term "appellee," any party, other than an appellant, who is specifically named in the caption will be deemed to be an appellee. Schulz v. Chadwell, 548 S.W.2d 181 (Ky. App. 1977).

This rule is satisfied if the notice of appeal designates the appellees in such a way that it is possible to determine who is entitled to prosecute a cross-appeal under CR 74. Schulz v. Chadwell, 548 S.W.2d 181 (Ky. App. 1977).

Use of term "et al." in the caption of a notice of appeal does not make those parties to the action not specifically named in the caption parties to the appeal but does not prevent the appeal from being specifically named. Schulz v. Chadwell, 548 S.W.2d 181 (Ky. App. 1977).

2. Designation of Judgment.

Where appeal is from a final order in action of Commonwealth v. Maryland Nat. Ins. Co., the notice of appeal is not sufficient where it merely states that the appeal is taken by the named commissioner of insurance for the commonwealth of Kentucky from a final order "in this action on the 10th day of September, 1971" and is taken against the circuit judge as this is not a sufficient designation of the order from which the appeal was taken. Preston v. Williamson (1972), 483 S. W. (2d) 448.

2.1. —Appealable Judgment.

Where none of the notices of appeal filed by movants designated a final or appealable judgment, the Court of Appeals properly dismissed the appeals. Foremost Ins. Co. v. Shepard, 588 S.W.2d 468 (Ky. 1979).

Under the Kentucky Rules of Civil Procedure, it is an essential element of the notice of appeal that it state specifically the judgment or order appealed from and the designated judgment or order must itself be appealable. Foremost Ins. Co. v. Shepard, 576 S.W.2d 255 (Ky. App. 1978).

ILABLE COPY

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 87-CA-2067-MR

JOHN M. FOSTER, ET. AL. APPELLANTS

V. APPEAL FROM ALLEN CIRCUIT COURT
ACTION NO. 84-CI-000032

TRANSPORTATION CABINET,
COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS APPELLEE

* * * * * * * * * * *

ORDER

BEFORE: LESTER, CLAYTON, and COOPER, JUDGES

This Court, having considered the motion to dismiss filed by the Honorable G. D. Milliken, Jr., the responses thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby GRANTED and the above-styled appeal is hereby

DISMISSED for the following reasons. The notice of appeal, filed by the appellants, who are proceeding pro se, did not name G. D. Milliken, Jr. as an appellee in the caption or in the body of the notice of appeal. The orders appealed related solely to attorney fees for which Mr. Milliken filed a lien pursuant to KRS 376.460 for his representation of the appellants herein in the case of Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. John M. Foster, Virginia Foster, and Southeastern Natural Resources, 84-CI-032.

CR 73.03 requires that the notice of appeal identify by name all the appellants and all the appellees. The notice of appeal in the above-styled action listed the Commonwealth of Kentucky, Transportation Cabinet,

Department of Highways as plaintiff and John M. Foster and Virginia Foster as defendants. In designating appellees, the appellant(s) must be careful to include all parties whose interest must be represented in order for the appellate court to grant complete relief. An attorney is an indispensable party who must be named in the notice of appeal if any attorney's fee has been awarded to that attorney and is to be challenged, Hutchinson v. Hutchinson, Ky., 168 S.W. 2d 738 (1943).

The supplemental motion to dismiss is DENIED as MOOT.

ENTERED: NOVEMBER 16, 1987

Charles B. Leibson
JUDGE, COURT OF APPEALS

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 87-CA-2067-MR

JOHN M. FOSTER, and VIRGINIA FOSTER — APPELLANTS

VS. MOTION TO RECONSIDER ORDER

TRANSPORTATION CABINET
COMMONWEALTH OF KENTUCKY
DEPART OF HIGHWAYS
G. D. MILLIKEN, JR. — APPELLEE

Comes the appellants, John M. Foster and Virginia Foster, and move the Court to reconsider the Order which was filed on November 16, 1987, so as to permit the appellants to file a supplemental caption to be attached to and treated as a part of the Notice of Appeal which was filed on September 22, 1987, so that it will meet the requirements of the state CR 73.03. A copy of the supplemental caption, attached to a copy of the said Notice of

Appeal, is being enclosed. The reasons for the motion are stated as follows.

It appears that the purpose of the stated Court Rule is to determine that all parties affected by the appeal are identified. The content of the Orders which are specified in the Notice of Appeal clearly does this. That is the reason that I unintentionally neglected to include the name of G. D. Milliken, Jr. in the caption. The assertion of lien was filed as a part of Action No. 84-CI-032. That is the reason for my using the caption for that case and unintentionally omitting the name of G. D. Milliken, Jr. in the caption used, since his name is included in the Orders which are being appealed and which are identified in the Notice of Appeal.

It appears that the preparers of the Court Rules intended to make

provisions for correcting an excusable purely technical oversight, as by Rule 6.02, so that a litigant could be prevented from using that as a means to disrupt the central purpose of our system of justice.

The central issue of our appeal - the matter of Mr. Milliken's being in possession of $1,250.00 of the appellants' private funds by a process which does not conform to the established concepts of law, justice, the court rules, and court ruling precedent - involves not only the Kentucky state laws and system of justice, but also the provisions of the United States Constitution; the Bill of Rights in particular.

The immediate concern of the appellants is for the necessary action to be taken which will permit them to

make the necessary technical correction so that the appellate court can proceed with the necessary process of granting complete relief without the burden of appealing to a higher court. The pursuit of the correct process of obtaining justice, through our system of justice under the law, is the central concern of the appellants.

In this interest copies of the appellants' brief are being mailed to the appellate court clerk so as to be available when needed. I trust it will be a convenience to the Court that our daughter, who is on furlough as a medical missionary to Zaire, Africa, has typed the brief for us. She is not available to type the motion. The principles involved in the appeal are very important to the appellants. We fervently desire the opportunity to

correct any technical oversight that could affect the appellate court's procedure in granting complete relief. It appears that the principle of obtaining justice under the law would abundantly justify permitting the correcting of an unintentional technical oversight of a provision of a procedural Court Rule. It seems clear that the permitting of this correction would not do harm to the process of obtaining justice under the law. Whereas not allowing the correction to be made and permitting this technical oversight to be used to disrupt the process of justice under the law, would be in severe contrast to our concepts of justice and of government by law. The identity of the individuals who are affected by the appeal has been known since the date of the filing of the

Notice of Appeal because their names are stated in the content of the Orders which are being appealed. This fact should satisfy the purpose of the stated Court Rule. Then the association of the supplemental caption with the one employed for the Notice of Appeal should satisfy the technical requirements so as to prevent the disruption of the essential court process of achieving justice. Of course the purpose of the Court Rules is to enhance this process and not to disrupt it. Certainly for our system of justice to have meaning it has to provide an uninterrupted process for achieving justice.

The issues involved in the appeal are very serious matters of law and justice which merit a careful examination by the Court; even a Federal Court; of the issues which are covered

by the Bill of Rights. The proper function of our system of justice requires this. A readily correctable technical oversight should not be permitted to prevent the proper functioning of our system of justice in examining these serious issues. This appears to be very evident. That is why that I have persisted. I beg of the Court to consider this.

For the stated reasons, in keeping with the established concepts of law and justice, the appellants respectfully move the Court to permit the correction of the unintentional technical oversight and at a time convenient for the Court, to proceed with the examination of the fundamental issues of law and justice which are addressed in the appeal. The basic essential legal principle which is paramount in the outcome of this motion,

is that no individual's right to due process of law has been violated by the appellant's unintentional technical oversight of a provision of a Court Rule. Whereas the denial of the privilege of correcting the technical oversight, so that the due process of law and justice can proceed, would result in the appellants loss of this basic right which is provided by the United States Constitution. That is why that the appellants respectfully petition the Court to approve their motion. Surely it would be incredible to permit an easily correctable unintentional technical oversight of a procedural court rule to cause the loss of a due process of law, which is protected by the Constitution of the United Sates, by the correction not being accepted. The appellants

sincerely trust that their motion will be approved.

This the 20th day of November 1987.

John M. Foster
JOHN M. FOSTER
for Appellants

FOOTNOTE: A reading of CR 73.03 does not reveal to me any prohibitive discrepancy in the notice of appeal. I am confident that the supplementary caption can permit the vital process of law and justice to proceed. J. M. F.

Certification

This is to certify that copies of the foregoing and related instruments are being placed in the U. S. Mail addressed to Attorney G. D. Milliken, Jr., P. O. Box No. 1926, Bowling Green, Kentucky 42102.

This the 20th day of November 1987.

John M. Foster
JOHN M. FOSTER
for Appellants

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 87-CA-2067-MR

JOHN M. FOSTER, and
VIRGINIA S. FOSTER — APPELLANTS

V. APPEAL FROM ALLEN CIRCUIT COURT
ACTION NO. 84-CI-032

TRANSPORTATION CABINET
COMMONWEALTH OF KENTUCKY
DEPARTMENT OF HIGHWAYS
G. D. MILLIKEN, JR. — APPELLEE

The above styled caption is intended for treatment as a supplemental part of the caption for the notice of appeal which was filed on the 22nd day of September 1987, a copy thereof to which it is attached. This is related to a motion which also is being filed.

This the 20th day of November 1987.

John M. Foster
JOHN M. FOSTER
for Appellants

APPENDIX L

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. NOTICE OF APPEAL

JOHN M. FOSTER, and wife
VIRGINIA FOSTER DEFENDANTS

Notice is hereby given that, in the above-styled case, the order on August 20, 1987, which was filed of record with the Circuit Court Clerk, Allen Circuit Court, on August 25, 1987, and the order on September 16, 1987, which was filed of record with the Circuit Court Clerk, Allen Circuit Court, on September 18, 1987, are being appealed.

This the 22nd day of September 1987.

John M Foster

JOHN M. FOSTER
for Defendants

CERTIFICATION

Certification is hereby given that on this day a copy of the foregoing is being placed in the U.S. Mail addressed to Attorney G. D. Milliken, Jr., P. O. Box 1926, Bowling Green, Kentucky 42102.

This the 22nd day of September 1987.

John M. Foster

JOHN M. FOSTER
for Defendants

AOC-070
7-85

COURT OF APPEALS OF KENTUCKY

Internal Use Only

Supplemental
CIVIL APPEAL PREHEARING STATEMENT
(CR 76.14)
Without Waiving Motion to Dismiss Appeal

Commonwealth of Kentucky
Transportation Cabinet
Department of Highways
(Designated in Notice of Appeal as Plaintiff) — APPELLANT

V.

Court of Appeals Docket No. _____ (Leave Blank)

John M.Fosterand wife
Virginia Foster
(Designated in Notice of Appeal as Defendants) — APPELLEE

APPEAL FROM Allen CIRCUIT COURT - ACTION NO. 84-CI-012

TRIAL JUDGE: Honorable Clyde M.Thomas

DATE JUDGMENT/ORDER APPEALED FROM ENTERED Auguse 20th 1987

DATE NOTICE OF APPEAL FILED Sept 22,1987 NOTICE OF CROSS APPEAL _____

COUNSEL FOR Plaintiff, John M.Foster pro se (APPELLANT)
(Identify Party/Parties)

( ) Plaintiff: ( ) Defendant: ( ) Other (specify) in trial court

Appellant Counsel:
Name John M Foster
Address 5121 Gallatin Road,
City/State Scottsville, Ky 42164
Telephone (502) 622-5068

COUNSEL FOR No Appellee Designated in Notice of Appeal (APPELLEE)
(Identify Party/Parties)

( ) Plaintiff: ( ) Defendant: (x) Other (specify) in trial court

Appellee Counsel:
Name G.D.Milliken, Jr
Address 1039 College Street, P.O.Box 1926,
City/State Bowling Green, Ky 42101
Telephone (502) 781-6800

1. Has this case been before an Appellate Court previously No
   If so, when and identify _____

2. Type of litigation (e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.) ** Attach a copy of the complaint **
   Condemnation action. G.D.Milliken, Jr asserted Attorney's lien per KRS 376.460

3. Circuit Court Disposition (type of order: e.g., Default or Summary Judgment, Dismissal, etc.) (Attach a copy of any written opinion by trial court.)
   Final Order allowing fee entered August 20th,1987

4. Relief:
   (a) Damages: Amount Sought $ _____
   Amount Granted $ _____
   (b) Injunction: ( ) Granted ( ) Denied
   (c) Other: Attirney requested court to make an allowance of fee per KRS 376.460

APPENDIX N

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5. Facts and Issues: (Brief statement of facts, claims, defenses and issues litigated) (Attach a separate sheet if necessary.)

See attached sheet

6. Briefly state issues proposed to be raised on appeal (including jurisdictional challenges) and any question of first impression. (Attach a separate sheet if necessary.)

It is diifficult to determine just what issues Foster seeks to raise The best we can determine he takes the position that the Court erred in determining the facts of the case and should have given him a trial by jury. These issues are refuted in LaBach vs. Hampton 585 S.W.2nd 414 cited to the Court during the hearing.

7. Will the appeal turn on an interpretation or application of a particular case or statute? Yes If so, cite case or statute number.

KRS 376.460 and Rules 73.01 and 73.01 and the case of LaBach vs. Hampton 586 SW 2nd 414 Ky. 1979

8. Is there any known case involving substantially the same issue now pending before either appellate court of this state? Unknown to me If so, identify.

CERTIFICATION

I/We hereby certify that a copy of the foregoing statement was executed and a copy served on: John M.Foster and Virginia Foster by mailing to them a true copy on the 29th day of September 1987.

Attorney at Law.

(Signature) (Date)

Name: G.D.Milliken,Jr

Address: 1039 College Street, P.O.Box 1926
Bowling Green, Ky 42101

The filing of a civil notice of appeal suspends the running of time for further steps in the appeal--see CR 76.14(13)

5. Facts and Issues:

This is a condemnation action filed by the Commonwealth of Kentucky Transportation Cabinet, Department of Highways against John M. Foster and wife, Virginia Foster. These defendants first employed a Mr. David Patrick as their attorney and he worked on the case until he was dismissed by the defendants by Order of Court on or about December 5th, 1984. Mr. and Mrs. Foster then conferred with G. D. Milliken, Jr. on several occasions and finally G. D. Milliken, Jr. agreed to represent them in this case for a retainer fee of $2,500 plus $250.00 for estimated expenses and one-third of an amount equal to the difference between the amount that he had been offered by the Plaintiff, which we understood to be about $18,500.00, and such amount as

they recovered from the Plaintiff in this action. We continued to represent them until an Order of Court was entered on July 15, 1986 permitting us to withdraw as counsel on our motion to which order the defendant agreed in open court. The motion to withdraw was caused by Mr. Foster's attitude toward the Courts and by his insulting letters. Mr. Robert Alexander then was later employed to represent the defendants. During the time we represented the defendants we procured from the attorney representing the Plaintiff a proposed settlement offer of $30,800, which the defendants refused to accept or to consider. The jury on the final trial of the case awarded the defendants about $30,200. (The record will show the exact amount. Subsequently we asserted a lien pursuant to KRS 376.460 for

attorney's fee and submitted an itemized statement showing that we had 144 hours and 45 minutes of time involved. Mr. Foster and Mrs. Foster were present for the hearing on our motion for allowance of fee and both denied at the hearing that there was a contingent fee agreement. Whereupon I advised the Judge that I was willing for the fee to be fixed on quantum meruit with credit for fees paid to the other two attorneys. The Court took these under advisement and considered the facts he heard from all parties and took into consideration the cases cited by G. D. Milliken, Jr. and the law cited by Mr. Foster from Corpis Juris or American Jurisprudence and entered an order denying the defendants' demand for a jury trial on the allowance of fee and granted to G. D. Milliken, Jr. an

additional fee of $1,250.00 over and above the retainer fee, the amount allowed for expenses having been entirely expended for that purpose of paying expenses.

During the many many conferences with the Fosters and during the correspondence with them in numerous letters we advised the Fosters as to the law as determined by the Appellate Court of Kentucky and cited particularly the case of Highways Dept. v. Sherrod, and the defendant Foster was not only critical of the Judges of the Appellate Court in that and other cases but was insulting in his remarks about them. He stated that in spite of the cases cited he was going to see to it that the case was tried according to his idea about how it should be heard.

This and many other insulting

remarks about the Court, and the Appellate Court Judges and about his attorney were inexcusable and such that counsel for him could not persuade Mr. Foster to understand what the case law was governing this case and it became impossible to represent him under these circumstances. He would have been some what better off had he accepted the proposed offer made by the Plaintiff during the time the defendants were represented by G. D. Milliken, Jr. but he would never be satisfied under any circumstance unless he had his way about the trial and the procedure and evidence to be introduced, which was contrary to the case law. Also he stated that he wanted the Court in this case to fix boundary lines of is property not just in this case but so that it would change the description in the recorded deeds

including the property line in which he was having a misunderstanding with a neighbor.

The issues involved herein are the defendants' demand for a jury trial on the allowance of fee under KRS 376.460 and their disagreement with the findings of fact of the trial court, which were more than substantially supported by the proof.

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

CASE NO. 84-CI-032 ALLEN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. ORDER

JOHN FOSTER AND VIRGINIA FOSTER
Husband and wife, DEFENDANTS

This cause coming before the Court pursuant to Order entered by the Court on June 25, 1987, in which G. D. Milliken, Jr., previous attorney for the Defendants, and the Defendants, John Foster and wife, Virginia Foster, were directed to appear before the Court at 10:00 A.M. on Tuesday, July 7, 1987, for the purpose of a hearing as to what will constitute a reasonable attorney's fee, said fee when determined to constitute a lien against the check in the hands of

the Clerk of Allen Circuit Court.

The Court first considered a Motion filed by the Defendant, John Foster, to reconsider Order. The Defendants had moved the Court to reconsider the Order entered on June 25, 1987, and to reschedule hearings so as to permit the issue to be placed before a jury, to obtain a jury verdict for resolving the issue.

The Court inquired of Mr. John Foster as to whether he had any citation or legal authority entitling him to a jury trial on the subject matter, being a lien asserted by G. D. Milliken, Jr. under the provisions of KRS 376.640. The Defendant, John Foster, answered that he had no specific authority to cite but requested a continuance to provide for adequate time to look up the law on the subject.

G. D. Milliken, Jr. expressed to the Court that he had no objection to a continuance to permit Mr. Foster to look up the law on the subject.

The Court therefore orders that the above styled cause be continued for a hearing on said Motion to August 18, 1987, at 11:00 A.M. The court inquired of both G. D. Milliken, Jr. and John foster as to whether one hour would be sufficient, one-half of which was to be used by John Foster and the other half to be used by G. D. Milliken, Jr. for argument on the Motion for a jury trial in the above issue. Both agreed to the time.

The Court advised John Foster that he desired for Mr. Foster to find a direct precedent for a jury trial on the issue involved on an attorney's assertion of a lien for attorney's fees

under the provisions of KRS 376.460.

Therefore, IT IS ORDERED that this cause now be continued for a hearing on said Motion to August 18, 1987, at 11:00 A.M. at which time G. D. Milliken, Jr. and John Foster are directed to be present in Court for argument on said Motion.

This July 7, 1987.

Clyde M. Thomas

JUDGE, ALLEN CIRCUIT COURT

Prepared and tendered by
G. D. Milliken, Jr. pursant
to directions of the Court.

G. D. Milliken, Jr.

This is to certify that a copy of the foregoing proposed Order was this day mailed to Mr. and Mrs. John M. Foster, Route 8, Box 154, Scottsville, Kentucky 42164.

This July 7, 1987.

G. D. Milliken, Jr.

A TRUE COPY
ATTEST: ORRIE F. MEADOR, CLERK
BY: Debbie Lankford, D.C.

William A. LaBACH, Appellant

v.

Bobbie HAMPTON, Appellee.

Court of Appeals of Kentucky.

Aug. 3, 1979.

Appeal was taken from an order of the Fayette Circuit Court, Charles Eckstit, J., determining attorney fees. The Court of Appeals, Vance, J., held that: (1) in a situation where the proceeds of the client's recovery were paid into court but were subject to attorneys' liens, and the fund could not properly be distributed without a determination and award of fees to the attorneys involved, the trial court had jurisdiction to determine the amount of a fee to be paid to attorney by client; (2) trial court did not abuse its discretion in denying a jury trial on attorney's claim for a fee; and (3) attorney, who was employed under a 33⅓ percent contingent fee contract and was discharged without cause after performing some services but before completing the services he was engaged to perform, was entitled to a fee for services completed in the amount of 33⅓ percent of the amount eventually recovered by the client, less the reasonable value of services of the attorneys who completed the litigation after his discharge.

Judgment reversed.

1. Attorney and Client ⇐155

Where statute gave attorney a lien upon proceeds of settlement to secure payment of his fee, existence of such lien, as regards trial court's jurisdiction to determine fee, caused attorney's claim for fee to be integral part of the subject matter of the action rather than a matter foreign to it. KRS 376.460.

2. Attorney and Client ⇐155

Where proceeds of client's recovery were paid into court but were subject to attorneys' liens, and fund could not be properly distributed without determination and award of fees to attorneys involved, trial court had jurisdiction to determine, upon motion, amount of fees to be paid attorney by client.

3. Jury ⇐14(1)

It was not abuse of discretion for trial court to deny jury trial on attorney's claim for fees, where hearing to determine attorney fees involved legal work done by three separate attorneys, two of whom had contingent fee contracts, and proper assessment of fees necessarily required a determination of value of reasonably necessary services rendered by each of them; trial judge was in a much better position than jury to make such determination. CR 39.01(c).

4. Attorney and Client ⇐134(2)

Proper measure for allowance of a fee to an attorney, who is employed under contingent contract but discharged without cause before completion of the contract, is the contract fee less the reasonable cost of services of other attorneys required to complete contract.

5. Attorney and Client ⇐134(2)

Attorney, who was employed under 33⅓ percent contingent fee contract, but was discharged without cause after performing some services but before completing services he was engaged to perform, was entitled to recover as a fee for such services completed 33⅓ percent of the amount eventually recovered by client less reasonable value of services of attorneys who completed litigation after his discharge; attorney could also be allowed to recover any reasonable expenses of litigation advanced by him.

William A. LaBach, pro se.

Julian W. Knippenberg, Lexington, Deedra Benthall, Danville, for appellee.

Before HOWARD, VANCE and WHITE, JJ.

APPENDIX P

A63

BEST AVAILABLE COPY

Cite as, Ky.App., 555 S.W.2d 434

VANCE, Judge.

This appeal raises several questions concerning the correct procedures to be utilized in determining the fee for an attorney who has been employed under a contingent fee contract and who is discharged without cause after rendering some services but before completing the services he was engaged to perform.

The appellee, Bobbie Hampton, engaged David Graves, Jr., attorney, to institute proceedings against her employer and third parties to recover damages for injuries suffered by appellee in an industrial accident. Appellee also instituted proceedings under the Workmen's Compensation Act. It was agreed that Attorney Graves would receive a contingent fee equal to 40% of the amount of any recovery from the separate litigation.

Graves, after he had done substantial work on this claim, was discharged by appellee, and appellant, LaBach, was employed to continue the litigation under a 33⅓% contingent fee contract. LaBach also performed substantial services for appellee and obtained a settlement offer which was not accepted by appellee.

Appellee then discharged LaBach and engaged her present attorneys, and the case was settled for $20,000.00. The terms of the employment of the present attorneys and the nature of the services rendered by them in connection with the settlement are not disclosed by the record. Apparently the question of their fee was agreeably settled, and no dispute as to that fee is presented by this appeal.

By agreement of all parties and attorneys the $20,000.00 was paid into court and the defendants were discharged from liability. Attorney Graves filed a motion for an allowance of an attorney's fee and served it upon the other attorneys. The compensation carrier waived its right to subrogation, and thus appellee was entitled to all of the proceeds of the settlement except such amounts as she might be required to pay for the services of her attorneys and for costs.

Attorney LaBach objected to the jurisdiction of the trial court to determine his fee and alternatively contended that he was entitled to a jury trial. The trial court proceeded to hear the matter and allowed $2,000.00 to Attorney Graves and $1,000.00 to Attorney LaBach.

No appeal was taken from the allowance to Attorney Graves and that allowance is now final. Attorney LaBach has appealed. His first contention is that the trial court had no jurisdiction to determine, upon motion, the amount of a fee to be paid him by his own client. He relies upon *Sullivan v. Levin*, Ky., 555 S.W.2d 261 (1977), and *Oliver v. Yates*, Ky., 555 S.W.2d 263 (1977).

Sullivan and *Oliver*, *supra*, were divorce cases and decided that a trial court in a divorce case does not have jurisdiction to fix a fee for an attorney against his own client because the controversy as to the fee is foreign to the subject matter of the action. No claim was asserted in those cases that the attorney was entitled to a lien.

[1] The situation in this case is different because the claim was for the recovery of money, and KRS 376.460 gives to an attorney a lien upon the claim or the proceeds of settlement to secure the payment of his fee. The existence of the lien against the proceeds of the recovery causes the claim for a fee to be an integral part of the subject matter of the action rather than a matter foreign to it.

[2] In this case the proceeds of the recovery were paid into court but were subject to the attorneys' liens, and the fund could not properly be distributed without a determination and award of fees to the attorneys involved. In view of this necessity any interested party could have instituted an action for a determination of the fees, and we see no reason why the matter could not be raised upon proper notice by motion or intervening petition in the original action. The right to enforce an attorney's lien either by independent action or by motion in the original action has long been recognized in this Commonwealth. *Johnston v. Stephens*, 206 Ky. 83, 266 S.W. 881 (1924). We find no case deciding this precise point since the adoption of our civil

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rules, but it would seem that for reason of judicial economy, if for no other reason, this procedure should still be available.

Appellant next claims that he was entitled to a jury trial for a determination of the factual issues concerning his claim. Some states deny a jury trial on this issue for the reason that the enforcement of a lien is an equitable matter. *See Fain v. Schwartz*, Mo.App., 404 S.W.2d 210 (1966). The distinction between actions in equity and in law have been largely abolished in this state, and it may be that in some cases of this type there would be an entitlement to a jury determination of factual issues, even where the proceeding is by motion.

[3] We need not decide that question because under the facts of this case we find no error in the decision of the court to deny a jury. The hearing involved the legal work done by three separate attorneys, two of whom had contingent fee contracts, and the proper assessment of fees necessarily required a determination of the value of the reasonably necessary services rendered by each of them. The trial judge was in a much better position than a jury to make this determination, and the ruling of the trial court in this case was justified under the discretion allowed by CR 39.01(e).

Appellant finally complains that the amount of the allowance to him was inadequate. There is considerable confusion in our case law as to the proper measure for the allowance of a fee to an attorney employed under a contingent contract who is discharged without cause before completion of the contract.

It was decided in *Henry v. Vance*, 111 Ky. 72, 63 S.W. 272 (1901), that the fee should be computed upon a quantum meruit basis. Although designated as quantum meruit, the actual holding of the case was that the recovery should be the amount of the contingent fee "less such proportion of that sum as is reasonably represented by the labor and attention and expense that would have been required of plaintiffs to complete their undertaking, but which they did not do." *Id.*, 63 S.W. at 275–276.

In *Gilbert v. Walbeck*, Ky., 329 S.W.2d 450 (1960), the Court noted that the contingent fee contract was no longer of significance because the attorney was discharged before he completed the contract and held that recovery must be on the basis of quantum meruit, but it cited as authority *Henry v. Vance*, *supra*.

[4] We conclude from this that our courts have used the term quantum meruit to indicate that the discharged attorney cannot rely upon the contract to collect a full fee but must deduct from the contract fee the reasonable cost of services of other attorneys required to complete the contract.

This rule as applied to this case means that Attorney Graves was entitled to a fee of 40% of the recovery less the value of the services reasonably required of other attorneys to complete the contract. He was awarded $2,000.00 and apparently all parties were satisfied with that allowance. At least, there was no appeal.

[5] Attorney LaBach agreed to continue the litigation for a contingent fee of 33⅓%. Because he was discharged without cause before he had completed his services he was entitled to a recovery of 33⅓% of the amount later recovered less the value of the services reasonably required of others to complete the contract.

No evidence was offered by appellee as to the value of the services reasonably required to complete the contract. Appellee's theory was that appellant should have a value placed upon the services rendered by him, and apparently this was the basis used by the trial court to compute appellant's fee. This was erroneous.

While he was representing appellee, the appellant received a settlement offer of $10,000.00. His only contention before the trial court was that he was entitled to 33⅓% of the $10,000.00 offer which he had obtained. The measure of recovery advanced by appellant was not proper, and under the determination we have made it is possible that he actually may have been entitled under his contract to a greater fee than he requested.

On retrial, the appellant's fee will be 33⅓% of the amount eventually recovered ($20,000.00) less such sum as is determined to be the reasonable value of the services of

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the attorneys who completed the litigation after appellant's discharge, but in no event shall the fee exceed $3,333.33, the amount appellant claimed at trial. In addition to the fee, appellant shall be allowed to recover any reasonable expenses of litigation which were advanced by him.

The judgment is reversed for further proceedings in conformity with this opinion.

All concur.

DEPARTMENT FOR HUMAN RESOURCES COMMONWEALTH OF KENTUCKY, Appellant,

v.

George NESTER, Mary Nester, Rodney Nester, an infant and Janet Nester, an infant, Appellees.

DEPARTMENT FOR HUMAN RESOURCES COMMONWEALTH OF KENTUCKY, Appellant,

v.

Ora Cowsey WILLOUGHBY, Phyllis Cowsey, an infant, Perry Cowsey, an infant, David Cowsey, an infant, Appellees.

DEPARTMENT FOR HUMAN RESOURCES COMMONWEALTH OF KENTUCKY, Appellant,

v.

Vivian LUKE, Tabitha Luke, an infant, Orville Luke, Jr., an infant, Appellees.

DEPARTMENT FOR HUMAN RESOURCES COMMONWEALTH OF KENTUCKY, Appellant,

v.

Wilma COLE, Linda Chaney, an infant, Appellees.

Court of Appeals of Kentucky.

Aug. 10, 1979.

Department for Human Resources petitioned for discretionary review of judgments of the Montgomery Circuit Court, Caswell Lane, J., that neither the District Court nor the Circuit Court should hear or enter any orders in subsequent dependency or custody cases unless petitioner provided at initiation of the action agreement to pay fees of, and costs expended by, guardian ad litem for infant defendants. The Court of Appeals, Gant, J., held that: (1) guardian ad litem is necessary in cases of procedure to declare infant children dependent, neglected or beyond control of parents, and (2) Circuit Court's mandate requiring petitioner's agreement to pay fees and costs of guardian ad litem was without authority.

Affirmed in part and reversed in part.

1. Infants ⇐78(1)

Appointment of guardian ad litem is necessary in cases of procedure to declare infant children dependent, neglected or beyond control of parents. KRS 208.060(1)(b-d), 208.060(3)(a), (5).

2. Infants ⇐63

Circuit court had no authority to mandate that neither district court nor circuit court should hear any actions involving dependency or custody, or enter any orders therein, unless petitioner provided at initiation of action an agreement to pay fees of, and costs extended by, guardian ad litem for infant defendant. KRS 208.060(1)(b-d), 208.060(3)(a), (5), 208.070.

Charles P. Lawrence, Dept. for Human Resources, Frankfort, for appellant.

William B. Maise, Deborah L. Hiatt, Northeast Ky. Legal Services, Morehead, Knox Johnson, Mount Sterling, for appellees.

Before GANT, HAYES and HOWARD, JJ.

GANT, Judge.

These actions come before this court on Petition for Discretionary Review from

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MR. FOSTER: Yes.

THE COURT: The case which Mr. Milliken presents to me was decided on August 3, 1979.

MR. FOSTER: I didn't run across that one as I recall it.

THE COURT: What I was trying to explain to you is that American Juris Prudence is not controlling of a decision of a Court in Kentucky. Lawyers use this in research when they cannot find a direct precedent in Kentucky law, they use matters such as American Juris Prudence, Corpus Juris, and general treatises of the law in this case as persuasive authority, not as specific or controlling authority, but rather as persuasive authority as to how a Court should decide a particular case. American Juris Prudence is in no way binding upon a Judge to accept. It is,

however, some evidence how cases of this nature have been decided throughout America, and in the absence of specific law within the state would be persuasive to a Judge to decide that particular case or set of facts.

In this case the Court of Appeals of Kentucky, now the Supreme Court of Kentucky, has decided an issue of this nature and has decided that it is an equitable matter to be decided by the Judge and not by the jury.

The Judge in cases of this nature could if he determined that it was appropriate and the matters could be considered by a jury without going into the complexity of some of the things

ALLEN CIRCUIT COURT
CIVIL ACTION NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VERSUS INTERLOCUTORY ORDER AND JUDGMENT

JOHN M. FOSTER
VIRGINIA FOSTER
SOUTHEASTERN NATURAL
RESOURCES DEFENDANTS

* * * * * * * * * * *

The plaintiff having moved for the entry of an Interlocutory Judgment in this action pursuant to KRS 416.610, a hearing was conducted on May 16, 1984 in the circuit courtroom of the Simpson County Courthouse by agreement of the parties for the purpose of examining the record herein and determining such issues as before raised in the pleadings pertinent to the entry of the

Interlocutory Judgment sought by the plaintiff. The court, after hearing arguments of counsel, receiving the testimony of the plaintiff's engineer, R. T. Markle, Jr., and being otherwise sufficiently advised, finds:

1. The challenge to the right of the plaintiff to condemn raised in the answer of the defendants John M. Foster and Virginia Foster, is based upon the fact that the report of commissioners' filed herein bears the date of April 2, 1984 although the suit was filed on April 3, 1984. The court notes that it made the initial contact with the three commissioners who served in this case on the morning that the suit was actually filed, that they were assembled and sworn according to law on that date, and that they actually filed their report in the same day. These commissioners were

accompanied to the Foster property for their inspection by R. T. Markle, Jr. and his affidavit filed of record sufficiently establishes that the actual date of the e events was April 3, 1984. It is concluded that the discrepancy between the date of the report and the date the suit was filed was simply a clerical error and it is corrected to be April 3, 1984 for all purposes.

2. The answer of the defendants, John M. Foster and Virginia Foster, asserts that the land sought to be condemned in this action does not encompass all of the land owned by these defendants which the plaintiff proposes to take. The testimony of R. T. Markle, Jr. on this point was inconclusive for the reason that a correlation between the description contained in the deed by which the property was acquired by the

Fosters and the description shown on the official highway plans had not been established. No evidence was introduced on behalf of the Fosters, but their counsel contended that a substantial change in the channel of a boundary creek has occurred since their acquisition of the property and has resulted in the wrongful allocation of a portion of their lands to an adjoining owner, thus reducing the area for which they should properly be paid. The evidence before the court on this boundary issue is not sufficient at this time for adjudication. The court rules that the plaintiff's engineers should make the best possible correlation between deed descriptions and the highway plan descriptions, and that the burden of proving the Foster boundary as between them and adjoining owners rest

upon the defendants. The court, therefore, reserves its determination of this issue until such time as the proof is completed and the matter submitted upon proper motion. In the event that the area being acquired in this action is determined to be greater than that described in the plaintiff's petition, then an appropriate amendment will be required and the defendants will have an additional thirty days from such determination to file exceptions to the amount of the commissioners' award based upon the fact that it did not compensate for the entire area taken.

3. The plaintiff under the provision of KRS 416.540-416.670 and other applicable law is entitled to condemn the lands and materials hereinafter described, subject to the above findings.

4. The Report of Commissioners herein conforms to the provisions of KRS 416.580, after the date correction noted.

NOW THEREFORE, it is hereby ordered and adjudged that the plaintiff may pay to the defendants or deposit with the clerk of this court the sum of $28,006, the compensation awarded by the commissioners herein, and thereupon take immediate possession of the lands and materials described in the petition for the purposes therein set forth. The clerk of this court is hereby authorized and directed to pay said amount to David Patrick, attorney for the defendants.

This cause is continued for the filing of exceptions pursuant to KRS 416.620(1), and if none are filed within thirty (30) days this Interlocutory Judgment shall become final in all

respects without further notice or order. The master commissioner of this court, if no exceptions are filed, shall convey to the plaintiff title to the land and material condemned herein, as more particularly described on page 4 hereof.

The conditions and limitations upon the title or possession condemned herein, if any, are:

Parcel No. 218, fee simple title;

Parcel No. 218A and 218B, permanent easements for the purpose of drainage.

PARCEL NO. 218

Beginning 137.96 feet right of US 31E Section 3 Station 225 + 72.93, thence S 84° 20' 37" W, 77.53 feet to a point 62.61 feet right of Station 225 + 54.35, thence S 87° 47' 25" W, 140.74 feet to a point 76.00 feet left of Station 225 + 30.00, thence N 69° 0' 19" W, 62.93 feet to a point 137.27 feet left of Station 225 + 44.09, thence N 13° 54' 24" E, 1,361.27 feet to a point 150.00 feet left of Station 238 + 75.00, thence N 20° 19' 3" E, 762.93 feet to a point 130.00 feet left of Station 246 + 20.00, thence N 32° 5' 4" E, 723.75 feet to a point 130.00 feet left of Station 253 + 23.15, thence S 66° 45' 22" E, 282.91 feet to a point 146.01 feet right of Station 252 + 90.39, thence S 38° 56' 24" W, 382.69 feet to a point 115.00 feet right of Station 250 + 00.00, thence S 26° 10' 35" W, 313.83 feet to a point 140.00 feet right of Station 246 + 80.00, thence S 51° 55' 29" W, 63.77 feet to a point 115.00 feet right of Station 246 + 20.00, thence S 22° 59' 28" W, 899.49 feet to a point 130.00 feet right of Station 237 + 00.00, thence S 18° 23' 40" W, 440.18 feet to a point 120.00 feet right of Station 232 + 50.00, thence S 9° 54' 21" W, 661.66 feet to point of beginning.

Containing 16.45 acres

PARCEL NO. 218A

Beginning 137.96 feet right of U.S. 31E Section 3 Station 225 + 72.93, thence N 9° 54' 21" E, 416.76 feet to a point 135.76 feet right of U.S. 31E Section 3 Station 230 + 00.00, thence S 84° 24' 52" E, 696.44 feet to a point 826.67 feet right of U.S. 31E Section 3 Station 230 + 95.78, thence S 50° 10' 37" W, 527.10 feet to a point 493.37 feet right of U.S. 31E Section 3 Station 226 + 33.90, thence N 77° 43' 49" W, 52.12 feet to a point 441.34 feet right of U.S. 31E Section 3 Station 226 + 37.35, thence S 88° 20' 9" W, 206.05 feet to a point 238.54 feet right of U.S. 31E Section 3 Station 225 + 98.61, thence S 84° 20' 28" W, 103.60 feet to point of beginning.

PARCEL NO. 218B

Beginning 137.27 feet left of U.S. 31E Section 3 Station 225 + 44.09, thence N 34° 42' 36" W, 137.08 feet to a point 230.72 feet left of U.S. 31E Section 3 Station 226 + 41.25, thence N 33° 23' 45" W, 381.37 feet to a point 493.08 feet left of U.S. 31E Section 3 Station 229 + 01.67, thence N 19° 3' 55" W, 125.12 feet to a point 557.37 feet left of U.S. 31E Section 3 Station 230 + 00.00, thence S 77° 39' 23" E, 451.39 feet to a point 105.93 feet left of U.S. 31E Section 3 Station 230 + 00.00, thence S 13° 54' 24" W, 466.51 feet to point of beginning.

Being a portion of the same property conveyed to J. M. Foster and Virginia Foster, his wife, from Harry Foster, et ux, by a deed dated March 8, 1946, recorded in Deed Book 52, Page 191, in the records of the Allen County Clerk's office.

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It is further ordered and adjudged that the defendant owners of property which is the subject of this litigation shall vacate same and deliver possession thereof to the plaintiff upon the payment of the compensation awarded herein to the clerk of this court and the entry of this Interloctory Judgment. The sheriff of this county is authorized and directed to evict said owners from such property on or after the date of the payment of said compensation, or the date of the entry of this Interloctory Judgment, whichever is later, if necessary to the peaceable possession of the plaintiff. In the event of such eviction, the offending property owners shall pay the costs thereof, for which execution may issue.

The plaintiff shall pay all costs

of this action not incident to eviction, including the sum of $75.00 for each commissioner to be paid to the clerk for disbursement without further orders.

ORDERED AND ADJUDGED this 17th day of May, 1984.

Clyde M. Thomas
Judge, Allen Circuit Court

Tendered by:

Charles W. Huddleston
Attorney for Plaintiff

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ATTEST: ORAL S. [illegible], CLERK
BY: [illegible], D.C.

MR. FOSTER: I wish to be represented by counsel on the merits of the case, Your Honor. I thought the only issue today was whether I would get a jury trial, then I could employ counsel to present it to a jury.

THE COURT: Well counsel is one of the reasons we are here this morning. Now Mr. Foster, you have had three lawyers in this case. You had one to represent you awhile, and then you fired him. You then hired one, and he represented you awhile, and you fired him. You hired a third lawyer, we went through the trial of this case, and they you fired him. So we have had three lawyers that have represented you, and you have fired three of them. The case itself has been concluded by a judgment that is no longer subject to appeal, and we have this final issue resting here to

be decided. I am going or proceed to decide it this morning, and I want to give you opportunity at this time to present me whatever you want to tell me with relation to whether I should or should not grant an additional fee to Mr. Milliken. As I understand it, Mr. Milliken, you have been paid $2500.00 retainer and $250.00 toward expenses?

MR. MILLIKEN: Yes, sir.

THE COURT: And you claim an agreement of one-third above the amount offered and settled for, and Mr. Foster denies that, and that is the issue which I have to determine. You have further stated that in view of his denial that you are

Mr. Foster came to see me on or about the 11th of, about the 24th of November 1984, and at that time I ascertained that David Patrick was attorney, and I told Mr. Foster that I couldn't get in the case as long as he was in there. He said that he was going to discharge him, and he was discharged on December 12, 1984. At that time then I did get in the case, and we had an agreed fee, Judge, of $2500.00 retainer, plus $250.00 estimated expenses, and one-third of the amount of recovery over and above the amount which had been offered to him before I got into the case, and I was discharged on July 15, 1986 and Robert M. Alexander completed the case, and I understand did a good job for Mr. Foster.

THE COURT: When did you leave the case?

MR. MILLIKEN: July 15, 1986, was the date that I was discharged in the case.

THE COURT: And your fee was $2500.00-----

MR. MILLIKEN: Retainer fee.

THE COURT: ----- plus, that was a retainer.

MR. MILLIKEN: And one-third of the difference, one-third of the recover over and above what had been offered to him when I got into the case.

THE COURT: Are you saying that one0third is in addition to the $2500.00?

MR. FOSTER: Judge, could I -----

MR. MILLIKEN: Judge, it was the understanding that one-third was the amount, of the difference between what he had been offered and what he finally received out of the case.

THE COURT: Was that to be the total fee? I don't get the picture. What was your fee, what was your claim of total fee to which you were entitled?

MR. MILLIKEN: Judge, one-third of the amount of recovery over and above what he had been offered at the time I got into the case.

THE COURT: All right.

MR. FOSTER: Judge, could I respond?

THE COURT: No, sir, not until he finishes. I will hear you at length when he finishes.

MR. MILLIKEN: I have been advised by Mr. Huddleston, and he says that the Court record will show that the initial offer to Mr. Foster when Mr. Patrick was in it was $12,600.00. Then Mr. Patrick must have done him some good because at the time that I got in the case the

offer had been, according to Mr. Huddleston and he said that the record would show it, was $18,550.00. Now during the course of my employment in this case we secured from Mr. Huddleston an offer of settlement of $30,800.00 which Mr. Foster rejected.

Now Judge, to get back to the case that I cited here in this case, I will first read from the syllabus of the case. The Court of Appeals Vance, who is now on the Supreme Court, this is 550 S.W. 2d, 585 S.W. 2d 434, the Court of Appeals Vance value of the reasonably necessary services rendered by each of them, the trial judge was in a much better position than a jury to make this determination, and the ruling of the trial court in this case was justified under the discretion allowed by CR. 39.01(c).

Judge, I also might add that this case has some guidelines about the determination of fee which I think might be valuable to the Court and in Mr. Foster's favor too to some extent. Judge, that is the case we find, and that is as we understand to be the law of the State, and we submit that to the Court.

THE COURT: Mr. Foster.

MR. FOSTER: This one-third thing that he mentioned in addition to the $2750.00 which I paid him, this is the first I have ever heard of that. There was no understanding of that kind at any time, verbal, written or any other kind.

MR. MILLIKEN: Judge, in response to that I would be very glad to have this case decided on the quantum meruit situation. Very happy to do it that way.

MR. FOSTER: Could I read what I have here from the, from my research?

THE COURT: Yes, sir.

MR. FOSTER: Volume 31, American Juris Prudence, Second Series, Proof of Facts, Series 2d, page 178 section 23, Jury questions. When an attorney brings an action against his client to recover compensation allegedly due him for his professional services issues of fact related to counsels claim must be decided by the jury, at least when the evidence is conflicting or if disputed is such that reasonable minds might reach a different conclusion from it.

Now I have other quotations relevant to the claim for additional fee if I could read those.

THE COURT: Go ahead.

MR. FOSTER: Volume 7, American Juris Prudence, Series 2d, Compensation

of Attorneys, section 2A, page 312 time required. It is clear that time sent in doing professional work is not the sole nor always the controlling factor in assessing the value of the service. In deed it has been said the time spent by an attorney is sometimes of minor importance in determining the reasonable value of his service, since an experienced or skillful attorney might accomplish in a very short time what other, what another would require a much longer time to accomplish.

Volume 7, American Juris Prudence, Series 2d, page 297, Section 260, Fidelity and Professional Conduct. A lawyer who does not at all times represent his client with undivided fidelity is not entitled to compensation for his services even though his conduct was not intentionally prejudicial to his

client's interest, nor can he recover for services rendered in violation of the requirement of professional responsibility, and I refer specifically to that stipulation and how it came about.

Volume 26, American Juris Prudence, Series 2d, Proof

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of the lien claimed, as set forth in the statement. The statement shall in all other respects be in the form provided in KRS 376.445. (Enact. Acts 1954, ch. 102, § 3, effective June 17, 1954; 1978, ch. 384, § 507, effective June 17, 1978.)

376.460. Attorney's lien.—Each attorney shall have a lien upon all claims, except those of the state, put into his hands for suit or collection or upon which suit has been instituted, for the amount of any fee agreed upon by the parties or, in the absence of such agreement, for a reasonable fee. If the action is prosecuted to a recovery of money or property, the attorney shall have a lien upon the judgment recovered, legal costs excepted, for his fee. If the records show the name of the attorney, the defendant shall be deemed to have notice of the lien. If the parties in good faith and before judgment compromise or settle their controversy without the payment of money or other thing of value, the attorney for the plaintiff shall have no claim against the defendant for any part of his fee. (Enact. Acts 1976, No. 58, § 9.)

NOTES TO DECISIONS

ANALYSIS

1. Contingency fee contract.
2. Effect of lien.

1. Contingency Fee Contract.

Where client had wrongfully discharged an attorney who had done considerable work, under a contingency fee contract, in her behalf, the attorney would be entitled to a lien upon the eventual recovery equal to the percentage in the contract, less the reasonable value of the work of the successor attorney required to bring the matter to a successful completion. LaBach v. Hampton, 584 S.W.2d 434 (Ky. App. 1979).

2. Effect of Lien.

The existence of the lien against the proceeds of the recovery causes the claim for a fee to be an integral part of the subject matter of the action rather than a matter foreign to it. LaBach v. Hampton, 584 S.W.2d 434 (Ky. App. 1979).

376.990. Penalties.

NOTES TO DECISIONS

ANALYSIS

0.1. In general.
2. Good faith dispute.
3. Instructions.

0.1. In General.

If KRS 376.070 and subsection (2) of this section were construed to impose absolute criminal liability upon a contractor acting in good faith for a simple breach of contract, the statute probably would violate § 18 of the Kentucky Constitution which restricts imprisonments for debt and accordingly the statutes must be construed to require a culpable mental state before a contractor can be guilty of even a misdemeanor. Blanton v. Commonwealth, 562 S.W.2d 90 (Ky. App. 1978).

2. Good Faith Dispute.

The failure to pay claims for labor and material out of amounts received from the owner constitutes a misdemeanor under this section only if the contractor fails to pay sums which he knows to be due and owing and no criminal liability may be imposed for failure to pay an amount which is disputed in good faith by the contractor. Blanton v. Commonwealth, 562 S.W.2d 90 (Ky. App. 1978).

3. Instructions.

Where a jury could find that a contractor failed to make the payments required by this section and yet entertain a reasonable doubt from the evidence that he did so with the intention of dealing with the progress payments as his own by failing to satisfy known legal obligations to pay laborers and materialmen such contractor was entitled to a misdemeanor instruction. Blanton v. Commonwealth, 562 S.W.2d 90 (Ky. App. 1978).

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Man Lumber Co., D.C.Colo.1969, 313 F.Supp. 703.

The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S. v. Certain Parcels of Land in Prince George's County, Md., D.C.Md.1941, 40 F.Supp. 436.

67. —— Notice

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of pendency of the action and afford them an opportunity to present their objections, and if, with due regard for practicalities and peculiarities of the case, these conditions are reasonably met constitutional requirements are satisfied. Potter v. Castle Const. Co., C.A.Tex.1966, 355 F.2d 212.

Very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation; nevertheless, an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. National Ass'n for Advancement of Colored People v. Wilmington Medical Center, Inc., D.C.Del.1978, 453 F.Supp. 330.

One of the primary elements of due process is notice. Armstrong v. Maple Leaf Apartments, Ltd., D.C.Okl.1977, 436 F.Supp. 1125, affirmed in part 622 F.2d 466, certiorari denied 101 S.Ct. 271, 449 U.S. 901, 66 L.Ed.2d 131. See, also, Lieb v. American Pac. Intern., Inc., D.C.Pa. 1980, 489 F.Supp. 690.

Due process of law requires notice; however, if defendant has had notice "reasonably calculated" to give him actual notice of proceedings, requirement of due process of law is satisfied. In re International Coins & Currency, Inc., Bircy.Vt.1982, 22 B.R. 121.

68. —— Hearing

Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. Mathews v. Eldridge, Va.1976, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18. See, also, Orloff v. Cleland, C.A.Cal.1983, 708 F.2d 372.

One of the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution is that no person shall be deprived of his liberty by executive or administrative officers, without opportunity, at some time, to be heard, before such officers in respect to matters upon which that liberty depends, but the opportunity need not be upon a regular, set occasion, nor according to forms of judicial procedure. Kwong Hai Chew v. Colding, N.Y.1953, 73 S.Ct. 472, 344 U.S. 590, 97 L.Ed. 576.

In determining whether due process requires opportunity to be heard, significance of individual's loss must be balanced with governmental interest at stake, and court must consider three factors: (1) the private interests that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the physical and administrative burdens that the additional or substitute procedural requirements would entail. Brown v. McGarr, C.A.7 (Ill.) 1985, 774 F.2d 777.

This amendment does not require trial type hearing in every conceivable case of governmental impairment of private interests. U.S. v. Husband R. (Roach), C.A.Canal Zone 1971, 453 F.2d 1054, certiorari denied 92 S.Ct. 1785, 406 U.S. 935, 32 L.Ed.2d 136. See, also, Gerritson v. Vance, D.C.Mass.1980, 488 F.Supp. 267.

Due process right to fair hearing does not comprehend in every case actual participation in hearing as distinct from opportunity to participate, nor is the reach of constitutional right to fair hearing to be defined by tactical decisions of litigant, since the due process right to fair hearing is not precise formulation and is not susceptible of automatic application in each setting in which it is asserted. Local 130, Intern. Union of Elec., Radio and Mach. Workers, AFL-CIO v. McCulloch, 1965, 345 F.2d 90, 120 U.S.App.D.C. 196.

The right of litigant to be heard is one of fundamental rights of due process of law. Council of Federated Organizations v. Mize, C.A.Miss.1964, 339 F.2d 898. See, also, Ricker v. U.S., D.C.Me. 1976, 417 F.Supp. 133, supplemented 434 F.Supp. 1251.

APPENDIX W

A90

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plus what you testify to this morning. In testifying this morning I am going to want each of you gentlemen to be placed under oath and to give me your testimony. Inasmuch as you are contesting the fee in this case by Mr. Milliken, I am going to let your testimony be taken first, Mr. Foster. At this point would you raise your hand and be sworn in order to testify?

MR. FOSTER: Could I first ask the Court for information?

THE COURT: What information do you seek?

MR. FOSTER: My understanding from what you said in the beginning was that the only consideration today would be whether there would be a jury trial on it.

THE COURT: That was the first question to be decided yes, sir. That

is correct, and I have decided that question.

MR. FOSTER: It was my understanding that that was the only procedure today.

THE COURT: No, this is the second hearing we have held to dispose of this matter, Mr. Foster. I ordered a hearing previously, and you requested time to research this jury issue, and I gave you that time until today. I took that issue up first because if I had ruled that a jury was required that would have ended this case today, and that is why I took it up first. I have ruled that a jury is not required, and we are now ready to dispose of this case as to its merits. Do you have any reason why I should not proceed on the merits of this case?

MR. FOSTER: I wish to be

represented by counsel on the merits of the case, Your Honor. I thought the only issue today was whether I would get a jury trial, then I could employ counsel to present it to a jury.

THE COURT: Well counsel is one of the reasons we are here this morning. Now Mr. Foster, you have had three lawyers in this case. You have one to represent you awhile, and then you fired him. You then hired one, and he represented you a while, and you fired him. You hired a third lawyer, we went through the trial of this case, and they you fired him. So we have three lawyers that have represented you, and you have fired three of them. The case itself has been concluded by a judgment that is no longer subject to appeal, and we have this final issue resting here to be decided. I am going or proceed to

decide in this morning, and I want to give you opportunity at this time to present me whatever you want to tell me with relation to whether I should or should not grant an additional fee to Mr. Milliken. As I understand it, Mr. Milliken, you have been paid $2500.00 retainer and $250.00 toward expenses?

MR. MILLIKEN: Yes, sir.

THE COURT: And you claim an agreement of one-third above the amount offered and settled for, and Mr. Foster denies that, and that is the issue which I have to determine. You have further stated that in view of his denial that you are

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. MOTION

JOHN M. FOSTER, and wife
VIRGINIA FOSTER DEFENDANTS

Come the defendants, John M. Foster and Virginia Foster, and move the Court to issue an Order to dismiss the lien litigation which was filed against the defendants; which Order also will cause G. D. Milliken, Jr. to pay interest to the defendants at the current bank rate of 10.5% for the time that the lien funds are held by the Circuit Court Clerk because of the said litigation.

In support of this motion the defendants propose that former counsel

G. D. Milliken, Jr. has no legitimate claim against the damages award to the defendants by the jury verdict under the provisions of KRS 376.460 because of the following facts:

I. The "fee agreed upon by the parties" was $2500.00 plus $250.00 for anticipated expenses. G. D. Milliken, Jr. acknowledged in court on August 18, 1987, that this amount was paid to him at the time he was employed.

II. The statement by G. D. Milliken, Jr. made in court on August 18, 1987, that the fee agreed upon by the parties included one-third of the damages awarded to his clients is totally false. He had never made any such proposition at any time.

This the 26th day of August 1987.

John M. Foster

JOHN M. FOSTER
for Defendants

NOTICE

Notice is hereby given that the above stated motion may be considered at a time most convenient for the Court.

A copy of the foregoing has been placed in the U.S. Mail addressed to Attorney G. D. Milliken, Jr., P. O. Box 1926, Bowling Green, Kentucky 42102.

This the 26th day of August 1987.

John M. Foster

JOHN M. FOSTER
for Defendants

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. FIRST AMENDED MOTION

JOHN M. FOSTER, and wife
VIRGINIA S. FOSTER DEFENDANTS

Come the defendants John M. Foster and Virginia S. Foster and withdraw the Motion entered on 26 August 1987 and in the place thereof file this First Amended Motion as follows:

Come the Defendants and move the Court to set aside the Order dated the 20th day of August 1987 and entered on August 25, 1987, and to issue an order to cause Attorney G. D. Milliken, Jr. to return to the Clerk, Allen Circuit Court, the sum of $1250.00 along with

interest at the rate of 10.5 percent which is the interest rate now being paid by the defendants for funds to meet obligations which would have been met with the $1250.00 of their damages fund awarded to them by the jury; this sum, with the accumulated interest, to be paid to the defendants.

In support of this First Amended Motion the defendants state their position as follows:

(1) At the time their Motion, dated the 26th day of August 1987, was filed they did not have knowledge of the Order entered on the 25th day of August 1987.

(2) The defendants have filed Affidavits in support of this First Amended Motion.

(3) State that under the provisions of the law upon which

Attorney G. D. Milliken, Jr. based his filing of a lien against the assets of the defendants - namely KRS 376.460 - that the provisions of this law do not support the assertion of an attorney's fee lien under the circumstances that existed.

That one, or more, of three possible conditions would have to be extant:

(a) that the "fee agreed upon by the parties" had not been paid, or,

(b) that the fee agreed upon by the parties contained a contingency fee contract or agreement, or,

(c) that there would have been no attorney fee agreement.

Absolutely none of the above said conditions existed.

The attorney fee lien litigation was filed under the stated KRS 376.460.

(4) State that no valid attorney fee lien litigation was possible because the conditions fur such litigation pursuant to KRS 376.460 did not exist.

(5) State that no other legal action could be taken at the hearing on this specific issue because the copy of the "assertion of lien" provided the defendants by Attorney G. D. Milliken, Jr. states that it is to be "pursuant to KRS 376.460."

(6) State that the Order dated July 7, 1987, makes no mention of any issue to be considered at the hearing on August 18, 1987, except "for argument on the motion for a jury trial in the above issue."

(7) State that the "fee agreed upon by the parties" was $2500.00, plus $250.00 for anticipated expenses, which was paid in full.

This the 9th day of September 1987.

John M Foster

JOHN M. FOSTER
for Defendants

NOTICE

Notice is given that this First Amended Motion is to be considered at 11:00 A.M. on September 15, 1987.

This is to state that a copy of the foregoing has been placed in the U.S. Mail addressed to Attorney G. D. Milliken, Jr., P. O. Box 1926, Bowling Green, Kentucky 42102.

This the 9th day of September 1987.

John M Foster

JOHN M. FOSTER
for Defendants

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. ORDER

JOHN M. FOSTER, and wife
VIRGINIA FOSTER DEFENDANTS

In the above-styled case the Court entered an order on August 20, 1987, which was filed of record with the Circuit Court Clerk, Allen Circuit Court, on August 25, 1987, copy thereof to Attorney G. D. Milliken, Jr. and to John and Virginia Foster, defendants herein. In that judgment the Court ruled on the pending matter of a lien claim filed by Mr. Milliken against the defendants pursuant to KRS 376.460.

The defendants, acting pro-se, by John M. Foster on August 26, 1987, filed a motion for the Court to dismiss the lien litigation and to cause Attorney G. D. Milliken, Jr. to pay to the defendants the sum of $1,250.00, with interest at the rate of 10.5% from the time he received these funds. Defendants apparently base their motion upon a claim that the monies previously paid to Mr. Milliken were for the entire fee in the handling of the case, and not a retainer fee of $2,500.00 and an advance for expenses of $250.00 as claimed by Mr. Milliken to be paid by the defendants on December 22, 1984.

On September 9, 1987, the defendants filed a document entitled "First Amended Motion" in which they first moved the Court to withdraw their

prior motion and in lieu thereof to substitute this amended motion. Defendants then went on to deny the right of Mr. Milliken to the fees which had been ordered by the Court in its prior order.

The Court withheld ruling on motion by Mr. Milliken that the amended motion be dismissed in that the same did not comply with the Rules of Civil Procedure. Further, by oral motion Mr. Milliken moved the Court to invoke sanctions against the defendants for frivolous actions that violate Civil Rule 11.

The Court has fully heard each of the defendants and has given careful consideration to their statements with relation to the claim for attorney's fees which are the subject of Mr.

Milliken's lien and claim. In that connection the record reveals that this is the first time that the defendants have claimed that the monies previously paid to Mr. Milliken were "in full." In their motion of July 22, 1987, filed of record with the Allen Circuit Court on July 23, 1987, the defendants alleged that the conduct of their former attorney constituted legal malpractice in that he did not pursue matters that the defendants perceived them to be, but instead engaged in meaningless work. They further stated that the case should have been resolved well within the range of a $2,500.00 fee plus $250.00 for expenses which was paid and that he had no further claim to their assets.

Considering all of these matters the Court finds that the question of

entitlement to attorney's fees was fully considered and ruled upon by the order of the Court dated August 20, 1987 which was a final and appealable order that was deposited with the Clerk of the Court on August 25, 1987. Having fully considered and determined those matters at that time there is no basis in the present motions or amended motion filed by the defendants for this Court to withdraw, amend, or vacate its prior order and the Court so determines.

The Court has considered the claim of frivolous action under Civil Rule 11 in that the defendants are acting as their own attorney and subject to that rule but declines to impose any sanctions upon this matter at this time.

The motion and amended motion of the defendants is denied. This is a

final and appealable order with no just cause for delay.

ENTERED this 16th day of September, 1987.

Clyde M. Thomas

CLYDE M. THOMAS, JUDGE

A TRUE COPY
ATTEST: Gail F. MEADOR, CLERK
BY: [signature], D.C

-3-
And Last

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Requirements of this clause apply only to denial of property or liberty rights protected by the constitution. National Ass'n for Advancement of Colored People (Atlanta Local) v. U.S. Postal Service, D.C.Ga.1975, 398 F.Supp. 562. See, also, Pan Am. World Airways, Inc. v. U.S. Dist. Court for Central Dist. of California, C.A.Cal.1975, 523 F.2d 1073; DeWalt v. Barger, D.C.Pa.1980, 490 F.Supp. 1262; National Ass'n for Advancement of Colored People v. Wilmington Medical Center, Inc., D.C.Del.1978, 453 F.Supp. 330; International Tel. & Tel. Corp. v. Alexander, D.C.Del.1975, 396 F.Supp. 1150.

30. —— Access to courts

The right to petition the government for a redress of grievances includes the right of access to the courts; that right is also subject to due process protection in that the opportunity must be at a meaningful time and in a meaningful manner. Manor of N.C. Trading, 1978, 586 F.2d 221, 66 CCPA 11.

31. —— Double jeopardy

Prohibition against double jeopardy is so fundamental that its basic core must be included within the equally fundamental componentsal right of due process. U.S. v. Security Nat. Bank, C.A.N.Y.1976, 546 F.2d 492, certiorari denied 97 S.Ct. 1591, 430 U.S. 950, 51 L.Ed.2d 799.

32. —— Equal protection

See, also, Abuse of Discretion under Amend. 14.

When social and economic legislation enacted by Congress is challenged on equal protection grounds as being violative of this clause, the rational basis standard is the appropriate standard of judicial review, and if the classification has some "reasonable basis," it does not offend this clause simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. U.S.R.R. Retirement Bd. v. Fritz, Ind.1980, 101 S.Ct. 453, 449 U.S. 166, 66 L.Ed.2d 368, rehearing denied 101 S.Ct. 1421, 450 U.S. 960, 67 L.Ed.2d 383.

This clause encompasses equal protection principles. Matthews v. de Castro, Ill.1976, 97 S.Ct. 431, 429 U.S. 181, 50 L.Ed.2d 389. See, also, National Ass'n for Advancement of Colored People v. Wilmington Medical Center, Inc., D.C.Del.1978, 453 F.Supp. 330; United Federation of Postal Clerks v. Blount, D.C.D.C.1971, 325 F.Supp. 879, affirmed 92 S.Ct. 80, 404 U.S. 802, 30 L.Ed.2d 38.

There may be overriding national interests which would justify minorities federal legislation which would be unacceptable for an individual state under Amend. 14 but, when a federal rule is applicable only to a limited territory and there is no special national interest involved, this clause will be construed as having the same significance as the equal protection clause. Hampton v. Mow Sun Wong, Cal.1976, 96 S.Ct. 1895, 426 U.S. 88, 48 L.Ed.2d 495.

Supreme Court's approach to equal protection claims under this amendment is the same as its approach to equal protection claims under Amend. 14. Weinberger v. Wiesenfeld, N.J.1975, 95 S.Ct. 1225, 420 U.S. 636, 43 L.Ed.2d 514.

If a classification would be invalid under the equal protection clause of Amend. 14, it is also inconsistent with this clause. Johnson v. Robison, Mass.1974, 94 S.Ct. 1160, 415 U.S. 361, 39 L.Ed.2d 389. See, also, Richards v. Secretary of State, Dept. of State, C.A.Cal.1985, 752 F.2d 1413; U.S. v. Gordon-Nikkar, C.A.Fla.1975, 518 F.2d 972; Young v. Pierce, D.C.Tex.1982, 544 F.Supp. 1010.

This amendment contains no equal protection clause, but it does forbid discrimination that is so unjustifiable as to be violative of due process. Shapiro v. Thompson, U.S.Conn., Dist.Col. & Pa. 1969, 89 S.Ct. 1322, 394 U.S. 618, 22 L.Ed.2d 600. See, also, U.S.R.R. Retirement Bd. v. Fritz, Ind.1980, 101 S.Ct. 453, 449 U.S. 166, 67 L.Ed.2d 368, rehearing denied 101 S.Ct. 1421, 450 U.S. 960, 67 L.Ed.2d 383; Schlesinger v. Ballard, Cal.1975, 95 S.Ct. 572, 419 U.S. 498, 42 L.Ed.2d 610, rehearing denied 95 S.Ct. 1363, 420 U.S. 966, 43 L.Ed.2d 66; Johnson v. Robinson, Mass.1974, 94 S.Ct. 1160, 415 U.S. 361, 39 L.Ed.2d 389; Schneider v. Rusk, Dist.Col.1964, 84 S.Ct. 1187, 377 U.S. 163, 12 L.Ed.2d 218; Hirabayashi v. U.S., 1943, 63 S.Ct. 1375, 320 U.S. 81, 87 L.Ed. 1774; Jones v. Reagan, C.A.Ill.1983, 696 F.2d 536; Mack v. U.S., 1980, 635 F.2d 838, 224 Ct.Cl. 187, certiorari denied 101 S.Ct. 1988, 451 U.S. 913, 68 L.Ed.2d 304; Tanner v. Weinberger, C.A.Ohio 1975, 528 F.2d 31; NAACP v. Allen, C.A.Ala.1974, 493 F.2d 614, affirmed 767 F.2d 1264; Wright v. Atlas Production Credit Ass'n, C.A.Okl.1972, 468 F.2d 997.

APPENDIX BB

A109

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COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. AFFIDAVIT IN SUPPORT OF FIRST AMENDED MOTION

JOHN M. FOSTER, and wife
VIRGINIA S. FOSTER DEFENDANTS

Comes the defendant John M. Foster and states that the "fee agreed upon by the parties" was $2,500.00, plus $250.00 for anticipated expenses, which was paid in full to Attorney G. D. Milliken, Jr. at the time he was employed.

No contingency fee of any kind was discussed at any time, or adopted.

State that, under the circumstances by which he obtained the funds, that Attorney G. D. Milliken, Jr. is in

illegal possession of $1250.00 of the defendants' private funds. That the method by which he obtained possession of these funds is entirely foreign to "pursuant to KRS 376.460" under which he asserted the lien. Therefore his possession of these funds is not supported by law.

State that the following quotation from Mr. Milliken's statement on page 8 of the transcript of the hearing on August 18th, 1987 "and one-third of the amount of recovery over and above the amount which had been offered to him before I got into the case"; that this statement is entirely false. No such contingency fee arrangement was discussed at any time.

This the 9th day of September 1987.

John M. Foster

JOHN M. FOSTER

State of Kentucky
County of Allen

I, Geraldine Nichols, a Notary Public, affirm that John M. Foster did this June 9 1988 sign this affidavit in my presence.

Given under my hand and seal this the June 9 1988.

Geraldine Nichols
My commission Exp. 12-7-89
State of Ky. at Large

This is to state that a copy of this affidavit has been placed in the U.S. Mail addressed to Attorney G. D. Milliken, Jr., P. O. Box 1926, Bowling Green, KY 42102.

This ~~9th~~ 13 day of ~~September~~ June 1988.

John M Foster
JOHN M. FOSTER

APPENDIX CC

A112

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

VS. AFFIDAVIT RELATING TO MOTION

JOHN M. FOSTER, and wife
VIRGINIA FOSTER DEFENDANTS

Comes the defendant Virginia Foster and states that to her knowledge parts of the quotation-which-follows taken from page 8 of the transcript of the Court Hearing on 18 August 1987, are false: Mr. Milliken: ". . . I did get in the case, and we had an agreed fee, Judge, of $2500.00 retainer, plus $250.00 estimated expenses, and one-third of recovery over and above the amount which had been offered to him before I got into the case . . ." This

"and one-third of recovery" part, to my knowledge, is entirely false. Also, to my knowledge, the $2500.00 fee, plus $250.00 for estimated expenses, was the entire "agreed fee."

This the 9th day of September 1987.

Sworn and subscribed to before me by Virginia S. Foster on this the 8th day of September 1987.

Virginia Foster

STATE OF KENTUCKY

COUNTY OF ALLEN

I, GERALDINE NICHOLS, A Notary Public for the State of Kentucky County of Allen affirm that Virginia Foster did this the ~~8th~~ day of ~~September~~, ~~1987~~, sign this affidavit in my presence. Given under my hand and seal the ~~8th~~ day of ~~Sept.~~ ~~1987~~,

My Commission expires 12-7-89

State of Kentucky at Large

This is to state that a copy of this affidavit has been placed in the U.S. Mail addressed to Attorney G. D. Milliken, Jr., P. O. Box 1926, Bowling Green, KY 42102.

This 13 day of ~~September~~ June 1987.

John M. Foster

JOHN M. FOSTER
for Defendant

3-070

COURT OF APPEALS OF KENTUCKY

Internal Use Only

CIVIL APPEAL PREHEARING STATEMENT
(CR 76.14)

John M. Foster, and wife
Virginia Foster — APPELLANT

V. Court of Appeals Docket No. _____ (Leave Blank)

G. D. Milliken, Jr. — APPELLEE

APPEAL FROM Allen CIRCUIT COURT - ACTION NO. 84-CI-032
TRIAL JUDGE: Hon. Clyde M. Thomas
DATE JUDGMENT/ORDER APPEALED FROM ENTERED August 25, 1987
DATE NOTICE OF APPEAL FILED Sept. 22/87 NOTICE OF CROSS APPEAL _____
COUNSEL FOR John M. Foster, proceeding without counsel (APPELLANT)
(Identify Party/Parties)

( ) Plaintiff; ( ) Defendant; ( ) Other (specify) in trial court

Appellant Counsel:
Name John M. Foster, acting pro-se
Address 5121 Gallatin Road
City/State Scottsville, KY 42164
Telephone (502) 622-5068

COUNSEL FOR G. D. Milliken, Jr. (APPELLEE)
(Identify Party/Parties)

( ) Plaintiff; ( ) Defendant; ( ) Other (specify) in trial court

Appellee Counsel:
Name G. D. Milliken, Jr.
Address P. O. Box 1926
City/State Bowling Green, KY 42102
Telephone (502) 781-6800

1. Has this case been before an Appellate Court previously No
   If so, when and identify _____
2. **Type of litigation** (e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.) ** **Attach a copy of the complaint** **
   Assertion of lien
3. **Circuit Court Disposition** (type of order; e.g., Default or Summary Judgment, Dismissal, etc.) **(Attach a copy of any written opinion by trial court.)**
   Order to pay attorney G. D. Milliken an additional $1250.00
4. **Relief:**
   (a) Damages: Amount Sought $ _____
   Amount Granted $ _____
   (b) Injunction: ( ) Granted ( ) Denied
   (c) Other: Mr. G. D. Milliken is in possession of the $1250.00

APPENDIX EE

A116

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5. **Facts and Issues:** (**Brief** statement of facts, claims, defenses and issues litigated) (Attach a separate sheet if necessary.) Please see attached sheet.

The appellee has possession of $1250.00 of the damages fund awarded to the appellants by a jury verdict. He obtained this under false pretense by asserting an invalid lien which is not supported by KRS 376.460 and by making false statements in court.

6. Briefly state issues proposed to be raised on appeal (including jurisdictional challenges) and any question of first impression. (Attach a separate sheet if necessary.) (Please see attached sheet.)

The issue involves causing the return of the $1250.00 of the jury award plus interest plus all litigation costs plus all other due compensation based on the provisions of law, court ruling precedent, and the concepts of American jurisprudence as interpreted by the Court of Appeals.

7. Will the appeal turn on an interpretation or application of a particular case or statute? perhaps so If so, cite case or statute number.

Statute KRS 376.460. Case. William A. LaBach v. Bobbie Hampton, 1979.

8. Is there any known case involving substantially the same issue now pending before either appellate court of this state? No If so, identify.

CERTIFICATION

I/We hereby certify that a copy of the foregoing statement was executed and a copy served on:

G. D. Milliken, Jr.
P. O. Box 1926
Bowling Green, Kentucky 42101

John M. Foster Sept. 24, 1982
(Signature) (Date)

Name: John M. Foster

Address: 5121 Gallatin Road
Scottsville, KY 42164

The filing of a civil notice of appeal suspends the running of time for further steps in the appeal--see CR 76.14(13)

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The excessive time which the appellee claims to have spent on the case certainly was not spent in preparing the case. He wrote a letter in which he listed the items to be addressed in processing the case. The matter of the correct location of the defendants' southern property line issue between the plaintiff and the defendants was the first item. He came to the farm and inspected the well marked property line which had been established near the start of the century. He interviewed three of the six potential witnesses. Then he contacted the opposing counsel and found that he had written two right-of-way deeds to the state which contained some of the defendants' land

which the state was condemning. Events proved that the opposing counsels then agreed to produce a stipulation to be used to prevent the amending of the proposed deed to the state so that it would include all of the defendants' land that was being condemned. He abused his clients for a year and a half by pursuing that stipulation conspiracy. He had to be dismissed. Then he filed and invalid lien to collect an additional fee for his time spent in abusing his clients. He had been paid in full the total agreed fee of $2500.00 plus $250.00 for expenses.

Supplement to Item 6.

I filed a motion for a hearing to determine if a jury trial on the lien issue would be permitted. The Order for that hearing states clearly that the hearing scheduled for August 18, 1987,

is "for argument on the motion for a jury trial." The Court rejected the motion for a jury trial and then went directly into the issue of the lien, ignoring my objection that the lien issue was not scheduled for that hearing and my statement that I desired to obtain counsel to represent me on the lien issue. So that I--a law abiding citizen--was denied the right to obtain counsel that is guaranteed to the criminal and was not notified in advance so as to make preparation for the hearing on the lien issue. The order following that hearing has placed the appellee in possession of $1250.00 of the appellants' private funds; which reminds me of the provisions of Article V of the Bill of Rights. There certainly was a "fee agreed upon by the parties" which was paid in full and

there absolutely was no contingency fee arrangement. I had to pay another lawyer $2000.00 to conclude the case which the appellee had been paid to complete.

ALLEN CIRCUIT COURT

84-CI-032

DEPARTMENT OF HIGHWAYS — PLAINTIFF

V.

TRANSCRIPT OF HEARING
18 August 1987

JOHN M. FOSTER and
VIRGINIA FOSTER — DEFENDANTS

APPEARANCES: Hon. G. D. Milliken, Jr.
Milliken and Milliken
Bowling Green, Kentucky 42101
Counsel for Defendants during portion of the case and the Lien Holder.

Mr. John M. Foster
Gallatin Road
Scottsville, Kentucky 42164
Pro se

ARTHEMA CARTER
REGISTERED PROFESSIONAL REPORTER
49TH JUDICIAL CIRCUIT
P. O. BOX 23
SCOTTSVILLE, KY. 42164
502/237-3328
237-3885

APPENDIX FF

88-270

NO.

Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

John Marlin Foster and Virginia Scranton Foster

Petitioners

vs.

G. D. MILLIKEN, JR.

Respondent

MOTION TO DENY PETITION FOR WRIT OF CERTIORARI AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR LACK OF PROPER JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

G. D. MILLIKEN, JR.
Attorney At Law
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARLIN FOSTER and VIRGINIA SCRANTON FOSTER

Petitioners

vs.

G. D. MILLIKEN, JR.

Respondent

MOTION TO DENY PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Kentucky

G. D. Milliken, Jr.
Attorney At Law
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

Come the Respondent, G. D. Milliken, Jr., and moves the Court to deny the Petition for Writ of Certiorari from the Supreme Court of Kentucky on the ground that the Petitioner does not present a substantial federal question and that no federal question was raised or presented before the Supreme Court of Kentucky and that the final decision of the Court of Appeals upon which the Motion for Discretionary Review was denied by the Supreme Court of Kentucky and rested on an adequate non-federal basis.

In support of this Motion the Respondent files a Brief in opposition to the Petition for Writ of Certiorari, opposition being based upon lack of proper jurisdiction.

This the 12 day of Aug, 1988

G. D. Milliken, Jr.

G. D. Milliken, Jr.

CERTIFICATION

This is to certify that a true and correct copy of the foregoing was this day mailed to Mr. John M. Foster, Pro Se, 5121 Gallatin Road, Scottsville, Kentucky 42164 and a copy to Hon. John C. Scott, Clerk of the Supreme Court of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

This the 12 day of Aug., 1988

G. D. Milliken, Jr.

G. D. Milliken, Jr.

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QUESTION OF JURISDICTION PRESENTED

The Petition for Writ of Certiorari having failed to present a federal question, no federal question having been presented before the Supreme Court of Kentucky, the final decision of the Court of Appeals, upon which the Discretionary Review was denied by the Supreme Court of Kentucky having rested on adequate nonfederal basis, does this Petition for Writ of Certiorari meet the Supreme Court of the United States jurisdictional requirements of Part V Jurisdiction on Writ of Certiorari, Rule 17 Considerations Governing Review on Certiorari?

TABLE OF AUTHORITIES

1. Kentucky Revised Statutes 376.460.

2. Rule 73.01.

3. Rule 73.03.

4. Hutchinson et al vs. Hutchinson, 168 S.W. 2nd 738 (Ky) 1943.

5. Braden vs. Republic-Vanguard Life Insurance Company, 637 S.W. 2nd 241 (Ky) 1983.

6. Part V, Rule 17 Jurisdiction on Writ of Certiorari United States Supreme Court Rules.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARLIN FOSTER and VIRGINIA SCRANTON FOSTER

Petitioners

vs.

G. D. MILLIKEN, JR.

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR LACK OF PROPER JURISDICTION

To the Supreme Court of Kentucky

G. D. Milliken, Jr.
Attorney At Law
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

Comes the Respondent, G. D. Milliken, Jr., and in opposition to the Petition for Writ of Certiorari and states that the Petition for Writ of Certiorari does not state grounds for jurisdiction of this action in the Supreme Court of the United States.

The Supreme Court of Kentucky and the Court of Appeals of Kentucky have not decided a federal question upon which a Writ of Certiorari should be granted.

The case upon which the Court of Appeals of Kentucky ruled and upon which the Supreme Court of Kentucky denied a Motion for Discretionary Review is the case of Transportation Cabinet, Commonwealth of Kentucky, Departments of Highways vs. John M. Foster and Virginia Foster, in the Allen, Kentucky Circuit Court, being action no 84-CI-000032.

This was an action in which the Transportation Cabinet, Commonwealth of Kentucky, Department of Highways sought to and did condemn the property belonging to John M. Foster and Virginia Foster for the purpose of construction of a major Kentucky highway.

The Petitioner, John M. Foster and his wife Virginia Foster, were represented in this action by three different attorneys, all of whom withdrew their representation of the Petitioners, John M. Foster and Virginia Foster for varying and justifiable reasons.

The Respondent in this action withdrew as attorney for the Petitioners for the reason that the Petitioner, John M. Foster, wrote letters stating that he would not accept a decision of the Court of Appeals of Kentucky, which had rendered an opinion in the case of **Commonwealth of Kentucky vs. Sherrod**, 367 S.W. 2nd 844 relating to proper procedure in condemnation actions. In these letters John M. Foster attempted to reflect on the integrity and knowledge of the law of the Judges of the Court of Appeals of Kentucky renered this decision relating to condemnation proceedings. In addition, John M. Foster wrote threatening and disrespectful letters to this Respondent.

Withdrawal of Respondent as attorney for John M. Foster met the approval of John M. Foster and Virginia Foster when the Motion was presented in the Allen Circuit Court.

Having expended 144 hours and 55 minutes in the representation of John M. Foster and Virginia Foster over a period of many months in this action the Respondent filed a lien for attorney's fees pursuant to Kentucky Revised Statute 376.460.

The Allen Circuit Court directed the parties to appear before the Court for a determination of the amount of attorney's fee which should be allowed to the Respondent pursuant to the provisions of the above mentioned statute.

After hearing the argument of John M. Foster and G. D. Milliken, Jr. on two separate occasions, the Court entered an Order dated August 27, 1987 in which the Court found that the Defendants had previously paid G. D. Milliken, Jr. the sum of $2,500.00 as a retainer fee and $250.00 toward

the cost of the case and found from all of the evidence that an additional fee of $1,250.00 would be appropriate.

This Order appears on Pages A3-A9 of the Appendix filed by the Petitioner.

The Petitioner filed a "Notice of Appeal" to the Court of Appeals of Kentucky, which was styled as follows: Commonwealth of Kentucky, 49th Judicial District, Allen Circuit Court Case No. 84-CI-032, Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, Plaintiff vs. Notice of Appeal, John M. Foster and wife Virginia Foster, Defendants. A copy of this Notice of Appeal is attached to the Appendix of this Brief.

A Motion to Dismiss the Appeal was filed in the Court of Appeals of Kentucky on the ground that the Defendants, John M. Foster and wife Virginia Foster, had failed to comply with Rule 73.01 and Rule 73.03 of the Rules of Civil Procedure. Copies of these Rules are made a part of the Appendix.

The Court of Appeals of Kentucky entered an Order dated November 16, 1987 in which it dismissed the Appeal of John M. Foster and Virginia Foster for the reason that they had failed to comply with the provisions of Rule 73.03 of the Kentucky Rules of Civil Procedure.

A copy of the Order of the Court of Appeals is filed as a part of the Appendix.

It is to be noted that there was no issue relating to Federal Law or Constitutional Law involved in the Order of the Court of Appeals of Kentucky in this case.

A Motion for Reconsideration of this Order was filed by John M. Foster and the Court of Appeals of Kentucky entered an Order on January 21, 1988 denying the Motion for Reconsideration. A copy of this Order is filed with the Appendix.

Subsequently, John M. Foster and Virginia Foster filed a Motion for Discretionary Review in the Supreme Court of Kentucky relating to the Order entered by the Court of Appeals on November 16, 1987.

The Supreme Court of Kentucky denied the Motion for Discretionary Review. A copy is attached to the Appendix

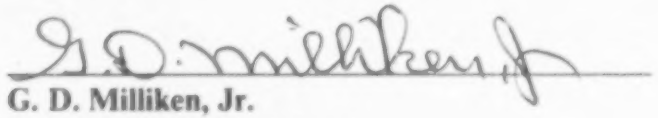
of this Brief.

Thus, it is clear that the Kentucky Courts of last resort have not decided a Federal question, but rendered an Order and Opinion based upon the failure of the Petitioner, John M. Foster and Virginia Foster to comply with the Rules of Civil Procedure on Appeal. The Supreme Court of the United States reaffirms the right of the Supreme Court of Kentucky to adopt and enforce its rules of procedure. Please make reference to Part V., Jurisdiction of Writ of Certiorari, Rule 17.

The Petition for Writ of Certiorari fails to disclose any ground for jurisdiction of this action under Part V, Rule 17.

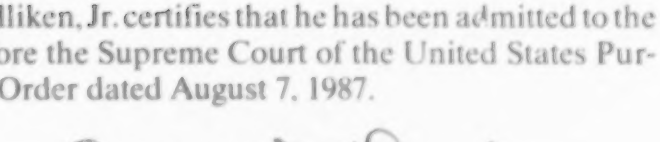
Thus it is clear from the reading of the Petition for Writ of Certiorari filed in this action that there are no grounds which provide for jurisdiction of the Supreme Court on this Petition. This Petition should therefore be denied and we respectfully request the Supreme Court of the United States to deny the Petition for Writ of Certiorari in this action.

Respectfully.



G. D. Milliken, Jr.
Attorney for Respondent
1039 College Street
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

G. D. Milliken, Jr. certifies that he has been admitted to the practice before the Supreme Court of the United States Pursuant to an Order dated August 7, 1987.



G. D. Milliken, Jr.

CERTIFICATION

This is to certify that a true and correct copy of the foregoing was this day mailed to Mr. John M. Foster, Pro Se, 5121 Gallatin Road, Scottsville, Kentucky 42164 and a copy to Hon. John C. Scott, Clerk of the Supreme Court of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

This the 12 day of Aug, 1988

G. D. Milliken, Jr.

G. D. Milliken, Jr.

APPENDIX

1. Order of Allen Circuit Court dated June 25, 1987 directing hearing on attorney's fees.

2. Copy of Notice of Appeal.

3. Rule 73.03, Kentucky Rules of Civil Procedure.

4. Order of Court of Appeals of Kentucky Dismissing Appeal.

5. Copy of Hutchinson et al vs. Hutchison, 168 S. W. 2nd 738 (Ky.) 1943.

6. Copy of Braden vs. Republic-Vanguard Life Insurance Company, 637 S. W. 2nd 241 (Ky.) 1983.

7. Order of Cour of Appeals denying Motion for Reconsideration.

8. Order of the Supreme Court of Kentucky denying Motion for Discretionary Review.

9. Part V. Jurisdiction on Writ of Certiorari, Rule 17. United States Supreme Court Rules.

10. Appendix.

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

Vs. ORDER

JOHN FOSTER and
VIRGINIA FOSTER, wife DEFENDANTS

In the above-styled case the defendants were previously represented by Mr. G. D. Milliken, Jr., an attorney at law, but whose services were terminated by the defendants. Thereafter on July 15, 1986, Mr. Milliken filed an Assertion of Lien for reasonable attorney's fees pursuant to KRS 376.460. Subsequent to the filing of this lien assertion Mr. Milliken filed an itemized statement of services rendered and the same has been of record in the file of this case since October 31, 1986.

The above-styled case has now been concluded by trial before a jury and trial order and judgment was entered upon jury verdict on April 23, 1987. No appeal or other matter has been filed by the defendants herein except defendants file dismissal of attorney, Mr. Robert M. Alexander, which was received in the office of the Circuit Court Clerk on June 22, 1987, and is of record.

Pursuant to the trial order and judgment, which rendered a judgment in favor of the defendants John Foster and

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

wife, Virginia Foster, the plaintiffs have forwarded a check in the amount of $2,359.56 as payment for the difference between the amount of the jury verdict and the amount previously paid to defendants upon the orders of the Court based upon recommendation of the duly appointed appraisers. This check is now in the possession of the Clerk, Allen Circuit Court, and is ordered to be held by that Clerk pending further orders of this Court.

IT IS NOW ORDERED that Mr. G. D. Millliken, Jr., previous attorney for the defendants, and the defendants John Foster and wife, Virginia Foster, shall be and appear before this Court at 10:00 a.m. on Tuesday, July 7, 1987, for the purpose of a hearing as to what will constitute a reasonable attorney's fee, said fee when determined to constitute a lien against the check in the hands of the Clerk, Allen Circuit Court.

This Order entered pursuant to KRS 376.460.

ENTERED this 25th day of June, 1987.

CC: ATTY HUDDLESTON
ATTY MILLIKEN
ATTY ALEXANDER
MR FOSTER
MRS FOSTER

clyde M. Thomas
CLYDE M. THOMAS, JUDGE

BY: Bobbie Rutherford D.C.

CERTIFICATION OF COURT RECORDS

I, Orel F. Meador, Clerk of the Allen [illegible] District Court, do [illegible] and true and correct copy of the original document(s) as [illegible] in my office.
In testimony whereof witness my hand as Clerk aforesaid this the 22nd day of June And Last 1987.

By: Bobbie Rutherford D.C

Commonwealth of Kentucky
42th Judicial Circuit

Allen Circuit Court Case No. 84-CI-032

Commonwealth of Kentucky
Transportation Cabinet
Department of Highways Plaintiff

Vs. Notice of Appeal

John M. Foster, and Wife
Virginia Foster Defendants

Notice is hereby given that, in the above-styled cases, the order on August 20, 1987 which was filed of record with the Circuit Court Clerk Allen Circuit Court, on August 25, 1987, and the order on September 16, 1987, which was filed of record with the Circuit Court Clerk, Allen Circuit Court, on September 18, 1987, are being appealed.

This the 22nd day of September 1987.

John M Foster
for Defendants

Certification

Certification is hereby given that on this day a copy of the foregoing is being placed in the U.S. Mail addressed to Attorney G.D. Milliken, Jr., P.O. Box 1926, Bowling Green, Kentucky 42102.
This the 22nd day of September 1967.

John M. Foster
for Defendants

Commonwealth Of Kentucky

Court Of Appeals

NO. 87-CA-2067-MR

JOHN M. FOSTER, ET AL. — APPELLANTS

v. APPEAL FROM ALLEN CIRCUIT COURT
ACTION NO. 84-CI-000032

TRANSPORTATION CABINET,
COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS — APPELLEE

* * * * * * * * * * * * * * * * *

ORDER

BEFORE: LESTER, CLAYTON, and COOPER, JUDGES.

This Court, having considered the motion to dismiss filed by the Honorable G. D. Milliken, Jr., the response thereto, and being otherwise sufficientiy advised, ORDERS that the motion be, and it is hereby GRANTED and the above-styled appeal is hereby DISMISSED for the following reasons. The notice of appeal, filed by the appellants, who are proceeding pro se, did not name G. D. Milliken, Jr. as an appellee in the caption or in the body of the notice of appeal. The orders appealed relate solely to attorney fees for which Mr. Milliken filed a lien pursuant to KRS 376.460 for his representation of the appellants herein in the case of Commonwealth of Kentucky,

Transportation Cabinet, Department of Highways v. John M. Foster, Virginia Foster, and Southeastern Natural Resources, 84-CI-032.

CR 73.03 requires that the notice of appeal identify by name all the appellants and all the appellees. The notice of appeal in the above-styled action listed the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways as plaintiff and John M. Foster and Virginia Foster as defendants. In designating appellees, the appellant(s) must be careful to include all parties whose interest must be represented in order for the appellate court to grant complete relief. An attorney is an indispensable party who must be named in the notice of appeal if any attorney's fee has been awarded to that attorney and is to be challenged, Hutchinson v. Hutchinson, Ky., 168 S.W.2d 738 (1943).

The supplemental motion to dismiss is DENIED as MOOT.

ENTERED: NOVEMBER 16, 1987

Charles B. Lester
JUDGE, COURT OF APPEALS

to the giving of the notification. The clerk shall note on each copy thus served the date on which the notice of appeal was filed, and shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

[Amended effective July 1, 1969; July 1, 1976; January 1, 1978; January 1, 1985.]

Source: FRCP 73(b).

Rule 73.04 Supersedeas Bond

(1) Whenever an appellant entitled thereto desires a stay on appeal, as provided in Rule 62.03, he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety. The address of the surety shall be shown on the bond. The bond shall be in a fixed amount and conditioned for the satisfaction of the judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, including costs on the appeal and interest as the appellate court may adjudge.

(2) When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the trial court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.

(3) When the judgment determines the disposition of the property in controversy as in real actions or replevin, or when such property is in the custody of the sheriff, or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. A supersedeas bond may be given to stay proceedings on a part of a judgment, and in such case the bond shall be varied so as to secure the part superseded.

[Amended effective June 1, 1960; April 1, 1963; July 1, 1976.]

Source: FRCP 73(d); CC 748, 751.

Rule 73.05 [Bond on Appeal]

[Repealed effective January 1, 1978.]

Rule 73.06 Failure to File or Insufficiency of Supersedeas Bond

(1) The appellee may move the trial court in which the supersedeas bond is filed for a hearing to determine the sufficiency of the bond or the surety thereon.

(2) If a supersedeas bond is not filed or if the bond filed is found insufficient, and if the action is not yet docketed with an appellate

appeals or motions for discretionary review (except Rule 76.20(2)(a)) does not affect the validity of the appeal or motion, but is ground only for such action as the appellate court deems appropriate, which may include:

(a) A dismissal of the appeal or motion for discretionary review,

(b) Striking of pleadings, briefs, record or portions thereof,

(c) Imposition of fines on counsel for failing to comply with these rules of not less than $250 nor more than $500, and

(d) Such further remedies as are specified in the applicable Rule.

If an appeal has not been docketed, the parties with the approval of the trial court may dismiss the appeal by stipulation in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(3) When the right of appeal in special civil cases is granted by statute, such appeals shall be prosecuted as provided in KRS 446.190.

(4) If an appellate court shall determine that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that the appeal or motion is so totally lacking in merit that it appears to have been taken in bad faith.

[Amended effective July 1, 1976; January 1, 1978; July 1, 1981; January 1, 1985; July 5, 1985; January 1, 1987.]

Source: FRCP 73(a).

Legislative Research Commission Note

The appeal from the Small Claims Division of District Court is governed by KRS 24A.340, which provides that an appeal may be taken within 10 days of the judgment to the appropriate circuit court.

Rule 73.03 Notice of Appeal

(1) The notice of appeal shall specify all the appellants and all the appellees; "et al." and "etc." are not proper designation of parties. The notice of appeal shall also designate the judgment, order or part thereof appealed from. The party or his attorney filing the notice of appeal shall certify that a copy of the notice was served upon all opposing counsel, or if a party is not represented by an attorney, then to the party at his last known address, prior to the filing of the notice with the clerk of the court.

(2) When the notice of appeal is filed, the clerk shall serve notice of the filing of the notice of appeal by mailing a copy thereof to the clerk of the appellate court and to the attorney of record of each party other than the appellant, or, if a party is not represented by an attorney, then to the party at his last known address; but his failure to do so does not affect the validity of the appeal and such notification is sufficient notwithstanding the death of the party or his attorney prior

law may have been committed only one bond could be required—that in any event a new bond may be required only where an offense is committed after the satisfaction of the judgment as to the prior bond. This argument, however, does violence to the plain terms of the statute which directs that the court, upon conviction, shall require the execution of the bond. It is the time of conviction that controls the execution of the bond not the time of the commission of the offense. No question is before us as to any supposed right appellant might have had to an earlier trial on the possession charge or as to the consequences that might have ensued from the requirement of separate bonds at approximately the same time.

Since the police court rightfully required the execution of the bond on appellant's conviction on the possession charge, the trial court correctly sustained the demurrer to the petition.

Affirmed.

203 Ky. 270

HUTCHINSON et al. v. HUTCHINSON.

Court of Appeals of Kentucky.

Feb. 12, 1943.

1. **Judgment** ⇐349

In a court of continuous session, the chancellor loses jurisdiction over his judgments 60 days after rendition thereof unless such jurisdiction is retained expressly or the running of the 60 day period is suspended by an order or some pending proceeding. KRS 451.130.

2. **Appeal and error** ⇐327(7)

An allowance of fees to an attorney directly makes him a "party" to the litigation, and if he has been allowed a fee to be taxed as costs, such part of the judgment cannot be vacated or modified unless the attorney be treated as a party and be expressly made a party on appeal to the Court of Appeals.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

3. **Divorce** ⇐197

Where trial court denied wife a divorce, he properly allowed her attorney a fee to be taxed as costs. KRS 453.120.

4. **Divorce** ⇐197

Where trial court dismissed wife's divorce petition and allowed her attorney a fee to be taxed as costs, and on wife's motion for new trial on ground that judgment was contrary to the evidence and the law, set aside the judgment dismissing the petition, and granted the divorce, some seven years later trial court was not authorized to set aside the judgment allowing the attorney's fee, where jurisdiction over such part of the judgment was not retained. KRS 451.130, 451.140, 453.120.

Appeal from Circuit Court, Jefferson County; Churchill Humphrey, Judge.

Divorce action by Velma Caldwell Hutchinson against James C. Hutchinson. Plaintiff's petition was dismissed and a $300 allowance for fees of her attorney was directed. Plaintiff's motion for new trial was sustained and judgment of dismissal was vacated and plaintiff was granted a divorce. Some seven years later the allowance of fees for plaintiff's attorney was set aside and plaintiff and her attorney moved the Court of Appeals to grant an appeal.

Motion sustained, appeal granted and judgment reversed.

Joseph M. Hayse and J. W. Clements, both of Louisville, for appellant.

J. L. Richardson, Jr., of Louisville, for appellee.

STANLEY, Commissioner.

On April 16, 1932, the court entered the following judgment in a suit for divorce being prosecuted by Mrs. Velma Caldwell Hutchinson:

"The Court being sufficiently advised, it is ordered by the Court that the petition herein be and the same is hereby dismissed at the defendant's costs.

"It is further ordered by the Court that the plaintiff's attorney herein, Joseph M. Hayse, be and he is hereby allowed a fee of $300.00 for his services rendered herein. It is further ordered by the Court that no attempt shall be made to collect the said fee of $300.00 for a period of one year, and

said attorney is hereby ordered and directed to notify the Court at the time he attempts to collect the said fee.

"It is further ordered by the Court that this action be and the same is hereby retained on the docket as to all further orders concerning the separate maintenance of the plaintiff herein."

The plaintiff promptly moved for a new trial. KRS 451.140. On September 30, 1932, the court sustained the motion and vacated "the judgment heretofore entered in this case dismissing the petition of the plaintiff," and granted her a divorce, with $2,000 alimony. The defendant's motion to set that judgment aside was taken under consideration, and on April 22, 1933, the plaintiff responded with certain pleadings, including a motion that her attorney be allowed $1,000 for his services. On December 30, 1933, "all pending motions were overruled." On January 6, 1934, the defendant moved to set that order aside and the plaintiff moved that the court order the clerk to issue an execution against the defendant for the $300 fee allowed her counsel on April 16, 1932. Several successive orders were entered setting the case for hearing on the motions or remanding the same. It was finally submitted on April 25, 1934, but nothing was done by the court until almost seven years later. On March 18, 1941, Joseph M. Hayse, attorney for the plaintiff, pursuant to notice served on the defendant, moved that the court pass on his motion of January 6, 1934, to direct the clerk to issue an execution for his fee of $300. The court then overruled that motion and under "retained power," as stated in the order, set aside the judgment allowing the fee. This left the attorney for the wife with no allowance of a fee although the court had granted the wife a divorce with substantial alimony. Mr. Hayse and his client have moved this court to grant an appeal from that order. KRS 21.080.

[1] In a court of continuous session the chancellor loses jurisdiction over his judgments sixty days after rendition unless it is retained expressly or suspended by an order or some pending proceeding, with certain exceptions inapplicable here. KRS 451.130; Trapp v. Aldridge, 67 S.W. 834, 23 Ky.Law Rep. 2430; Stokes v. Commonwealth, 286 Ky. 391, 150 S.W.2d 892. We do not find anywhere in the record any order retaining jurisdiction over that part of the judgment relating to the allowance of the fee of $300. It will be noted that it was only provided in the judgment of April 16, 1932, that the attorney should make no attempt to collect the fee for a period of one year and that he should notify the court when he did make that attempt. We are left entirely to conjecture as to the reason for attaching this condition. Whatever it was, the order was obeyed. It was nearly two years before the attorney made any such attempt and that was by asking the court to direct the issuance of an execution. His motion lay dormant for seven years longer and then the court not only overruled it but sua sponte undertook to set aside the judgment, which, by the way, had been allowed by another judge.

[2, 3] In support of this action the appellee submits that the judgment had been vacated on the plaintiff's motion by the order of September 30, 1932; hence, there was no basis for the later effort to collect the fee. That order only set aside "the judgment heretofore entered in this case dismissing the petition of the plaintiff," and then proceeded to grant a divorce as prayed. The motion was by the plaintiff and manifestly related to the adverse portion. The grounds were that it was contrary to the evidence and the law. The attorney in whose favor the judgment went did not join in or make any motion. The allowance was not made to the plaintiff but to the attorney personally. It has long been held that the allowance to an attorney directly makes him a party in interest to the litigation, and if he has been allowed a fee to be taxed as cost, such part of the judgment cannot be vacated or modified unless he be treated as a party and on appeal to this court be expressly made so. Woford v. Woford, 267 Ky. 787, 103 S.W.2d 296, 297. In this new judgment of September 30, 1932, no reference was made to the allowance of a fee for plaintiff's attorney. Regardless of the fact that the court had denied the wife a divorce by the first order, he had properly allowed her attorney a fee, to be taxed as cost. KRS 453.120. The then chancellor did not regard the second order as vacating his allowance of the fee, for he later overruled the plaintiff's motion to allow him $1,000. His successor undertook to set it aside under a retained power which was nonexistent.

[4] We are of opinion, therefore, that the court was without jurisdiction to set aside the judgment allowing the fee made

on April 16, 1932 (Williams v. Williams, 107 Ky. 496, 54 S.W. 716), and that the appellants are entitled to processes of the court to collect the judgment.

Wherefore the motion for an appeal is sustained, the appeal granted and judgment reversed.

293 Ky. 273

EDMISTON v. ROBINSON et al.

Court of Appeals of Kentucky.

Feb. 12, 1943.

1. Automobiles ⇐246(21)

Instruction that if driver of automobile in which guest was riding suddenly turned into the path of other colliding automobile causing driver of other automobile to be confronted with an emergency and that in exercise of a reasonable judgment the latter crossed to his left to avoid a collision, the law was for other driver, was proper.

2. Negligence ⇐2

One who by another's negligence is placed in a position of peril and thereby compelled to act in the emergency is not held to the same strict rule in the exercise of ordinary care required of one not facing danger.

3. Automobiles ⇐159

Driver faced with a "sudden emergency" caused by approaching automobile suddenly turning across highway may take the course which appears safest and if he injures another in so doing he will not be held liable if his conduct constituted ordinary care although the course he follows was the wrong one.

See Words and Phrases, Permanent Edition, for all other definitions of "Sudden Emergency".

4. Automobiles ⇐246(21)

In guest's action resulting from head-on collision of automobiles, where driver of approaching automobile was on right side of highway until automobile in which guest was riding created emergency by suddenly turning to the left, instruction as to the duties of driver of approaching automobile was not erroneous in failing to require him to drive on right side of highway.

5. Trial ⇐253(4)

An instruction directing jury to find a verdict for guest against owner of automobile in which guest was riding at time of collision, unless jury found guest was guilty of contributory negligence, could not be objected to on ground that it failed to enumerate all the duties imposed on driver of automobile in which guest was riding.

6. Automobiles ⇐224(5), 245(87)

Where automobile guest objected to speed on a curve but between the curve and scene of the accident several miles beyond the driver drove in a prudent manner, it was not incumbent upon guest to complain further and his failure to do so did not raise a submissible question of contributory negligence.

7. Appeal and error ⇐1066
Automobiles ⇐246(58)

In action by guest against owner for injuries sustained in automobile collision, where evidence was insufficient to form basis for instruction on contributory negligence and court instructed jury to find for guest unless it believed his negligence contributed to the accident and verdict was for owner the giving of contributory negligence instruction was reversible error, since verdict was necessarily bottomed upon such instruction.

Appeal from Circuit Court, Lincoln County; K. S. Alcorn, Judge.

Action by Roy Edmiston against Denver Robinson and John Huddleston to recover for injury sustained when an automobile driven by the defendant Huddleston in which plaintiff was a passenger, collided with an automobile driven by defendant Robinson. From a judgment for defendants entered on the verdict of the jury, plaintiff appeals.

Judgment affirmed as to defendant Robinson, and reversed and remanded as to defendant Huddleston.

Jay W. Harlan, of Danville, and Kelly J. Francis, of Stanford, for appellant.

Edward J. Hogan and Edwin O. Davis, both of Louisville, and Pat Rankin, of Stanford, for Robinson.

Stanley Badesch, of Louisville, and Herbert Reynolds, of Stanford, for Huddleston.

of a firearm at the scene of a crime. Kentucky's legislature was obviously motivated by similar concerns when it established KRS 533.060(1). Our statute provides for no exceptions from the meaning of "use." The Kentucky Court of Appeals was exactly correct when they construed the use of a firearm consistent with our legislature's intent to include the creation of a potential for death or injury by the very presence of a firearm in the hands of the criminal.

Both parties cite Websters Dictionary as a basis of their position concerning the construction of the word "use" as set out in the statute.

The ordinary and accepted meaning of the word "use" includes both an active and passive sense. "Use" in this statute is a noun. The definition of the noun "use" in Websters Third New International Dictionary includes the ability or power to use something. Clearly the thief had the ability to use the shotguns in display. Mere display escalates the situation to a dangerous and risky level. Actual display is not required. Haymon had "ure" of the weapons.

The definition of "use" in Black's Law Dictionary, includes the purpose served, a purpose, object or end for useful or advantageous nature. Here Haymon's commission of first-degree burglary involved a firearm which had the capacity of being used for an advantageous purpose. His crime came within the prohibition of the statute.

It should be recognized that the statute in question involves restricting the legislative grant of the privilege of probation. The power to grant probation is not inherent in the courts but is conferred by the legislature. *Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029 (1941). The legislature has authorized the courts to grant probation with the limitation that probation may not be granted where the offense is a Class A, B or C felony and the commission of the crime involved the use of a firearm. The provisions of the statute must be strictly construed. The trial judge properly ruled that it was not permitted to consider probation because the offense involved a firearm.

In order to more correctly reflect the true legislative intent, I would hold that being armed with a weapon is a "use" of the weapon within the meaning of KRS 533.060(1).

Wanda Gene BRADEN, Movant,

v.

REPUBLIC-VANGUARD LIFE INSURANCE CO., Respondent.

Supreme Court of Kentucky.

Sept. 21, 1983.

Widow of deceased mortgagor sought to recover from a credit life insurer the balance of mortgage payments due. The Jefferson Circuit Court entered summary judgment in favor of the insurer and the appeal by the widow was dismissed by the Court of Appeals and a motion for discretionary review was granted. The Supreme Court, Leibson, J., held that where the mortgage holder had taken little or no active part in pursuing the merits of the claim or attacking the insurer's defenses, the mortgage holder was not an indispensible party to the widow's appeal from summary judgment in favor of the insurer since it would be satisfied by being paid either from the insurance proceeds or by mortgage payments.

Decision of the Court of Appeals reversed, motion to dismiss appeal overruled, and case remanded.

1. Insurance ⇐624.1(1)

Where deceased mortgagor's estate was a named beneficiary of credit life policy to extent of any sum due over and above

amount necessary to pay off mortgage holder's claim and was also a de facto beneficiary of entire amount, whereas mortgage holder, already secured by mortgaged property, was a beneficiary in a technical sense, mortgagor's widow had standing to pursue claim on behalf of estate regardless of whether mortgage holder choose to do so. Rules Civ.Proc., Rule 17.01.

2. Insurance ⇐624.1(3)

Although the real beneficiary of credit life policy was the deceased mortgagor's estate, which would be relieved of the mortgage debt upon payment to the mortgage holder of the policy proceeds, where the mortgage holder, already secured by the mortgaged property, was a beneficiary in a technical sense, trial court did not err in requiring the joinder of the mortgage holder in action by the deceased mortgagor's widow to recover under the policy on behalf of the estate. Rules Civ.Proc., Rule 17.01.

3. Appeal and Error ⇐430(1)

Failure of notice of appeal to specify any party whose absence prevents the Supreme Court from granting complete relief among those already parties is fatal to an appeal. Rules Civ.Proc., Rule 17.01.

4. Appeal and Error ⇐327(2)

Where the real beneficiary of the credit life policy was the deceased mortgagor's estate, and the mortgage holder, which was a beneficiary of the policy in a technical sense, had been forced into the case by the insurer, which had demanded its presence as an indispensible party, but the mortgage holder had taken little or no active part in pursuing the merits of the claim or attacking the insurer's defenses, the mortgage holder was not an indispensible party to the widow's appeal from summary judgment in favor of the insurer since it would be satisfied by being paid either from the insurance proceeds or by mortgage payments. Rules Civ.Proc., Rule 17.01.

5. Appeal and Error ⇐328

The rules do not require joinder of a party as an indispensible party to an appeal if that party is unnecessary to the decision of the appeal and would incur an unnecessary expense if its presence was required.

Steven J. Kriegshaber, Louisville, for movant.

Thomas C. Hundley, Phillip J. Shepherd, Lexington, for respondent.

LEIBSON, Justice.

Wanda Gene Braden is the widow of Paul T. Braden, named insured in a life insurance policy issued by Republic-Vanguard Life Insurance Co. The purpose for the policy was to cover the balance on the mortgage on the Braden home in the event of Paul Braden's death. The policy provides that the mortgage holder as shown in the application is "beneficiary to the extent of (its) interest in the policy proceeds as creditor of the Insured at the date of the Insured's death. Any balance of policy proceeds will be paid to the Estate of the Insured." The original mortgage holder was Pence Mortgage Co., which subsequently assigned the mortgage to Baldwin-United Mortgage Co.

After Paul Braden's death, Wanda Gene Braden sued Republic-Vanguard for the payoff amount stated in the policy. The defense on the merits is based on a claim that the insured took his life in violation of the policy's suicide exclusion and the further claim of material misrepresentation in the insured's application for the policy in failing to report psychiatric treatment.

Immediately after the suit was filed, Republic-Vanguard moved to dismiss for failure to join the mortgage holder as an indispensable party. The court ordered that the mortgage company would be joined or the case dismissed. An Amended Complaint was filed naming Baldwin-United as an additional party, so that it could be paid off according to its interest in the event the claim was successful.

Subsequently the court sustained Republic-Vanguard's Motion for Summary Judgment as to the merits, finding material misrepresentation in the application as a matter of law. The trial court further

ruled that the dismissal as to Braden's claim was a final appealable order. Eight days later the trial court issued a separate order dismissing the claims of Baldwin-United, but did not specify the dismissal was a final and appealable order. Baldwin-United is still a party in the trial court in the event the case is reversed.

Braden appealed from the summary judgment. On motion of Republic-Vanguard the Court of Appeals dismissed the appeal for failure to join Baldwin-United as a necessary party to the appeal. Braden's Motion for Discretionary Review to this Court was granted. We find that Baldwin-United was not a necessary party to Braden's appeal. We reverse and remand the case to the Court of Appeals to consider the merits of the trial court's summary judgment.

The trial court ordered joinder of Baldwin-United as an indispensable party under CR 19.01. The question on this appeal is not whether the trial court was correct in considering the mortgage holder an indispensable party at the trial level. The question is whether it is indispensable in deciding Braden's appeal.

Quite obviously the real beneficiary of this policy is Braden's estate which is relieved of a debt of $30,325 upon payment of the policy proceeds to the mortgage holder. The mortgage holder, already secured by the mortgaged property, is beneficiary in the technical sense. Braden's estate was the real party in interest as that term is used in CR 17.01.

In *Aetna Insurance Co. v. Solomon*, Ky., 511 S.W.2d 205, 208 (1974) we stated:

> "The prevailing rule enunciated by this court is that one for whose benefit a contract is made may maintain an action thereon in his own name even though the undertaking is not directly to or with him."

[1] In *Aetna, supra*, certain owners of property damaged by fire who were not named as insured in the fire insurance policy were permitted to maintain an action as real parties in interest against the claim that they were not named beneficiaries on the contract. The same rule should apply to this appeal even though the primary beneficiary on the policy is the mortgage holder. Braden's estate is a named beneficiary to the extent of any sum due over and above the amount necessary to pay off the mortgage holder's claim, and the *de facto* beneficiary of the entire amount. As such Braden had standing to pursue this claim regardless of whether Baldwin-United chooses to do so also.

[2–4] We find no error in the trial court requiring the joinder of Baldwin-United under CR 19.01 because Baldwin is the named beneficiary of the policy. But we see no reason to require Baldwin-United as an indispensable party to the appeal. CR 73.03 requires that a "notice of appeal shall specify all of the appellants and all of the appellees ..." Failure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal. *Levin v. Ferrer*, Ky., 535 S.W.2d 79 (1975). But the only relief the appellant seeks in this case is reversal of the summary judgment with remand to the trial court to decide whether Republic-Vanguard has an affirmative defense to payment of the policy coverage. Assuming the appellant should prevail upon the merits, the judgment may still order Baldwin-United, which is still a party at the trial level, paid according to its interest in the proceeds. The critical difference is who is necessary to pursue the claim and who has a right to the proceeds. For this reason *New York Life Ins. Co. v. McCane*, 276 Ky. 712, 124 S.W.2d 1057 (1939), dealing with who is necessary at the trial level, is not applicable. Assuming the claim is ultimately successful Baldwin-United will receive payment, but Braden's estate will receive the benefit. As the party standing to receive the benefit, Braden's estate has standing to pursue the claim.[1]

1. The question of who should be the nominal plaintiff, Braden's widow or Braden's estate, is not before us. If necessary, the pleadings can be amended under Rule 15 to reflect the proper

[5] Baldwin-United has been forced into this case by the appellee who has demanded its presence as an indispensable party. Baldwin-United has taken little or no active part in pursuing the merits of the claim or attacking the life insurance company's defenses. It appears to be satisfied that it will be paid either from the insurance proceeds or by mortgage payments. There is no incentive for Baldwin-United to pay the expenses which arise in connection with an appeal. We do not interpret the rules as requiring joinder as an indispensable party to an appeal of a party who is unnecessary to the decision of the appeal and who would incur an unnecessary expense if its presence was required.

We have been asked to address several other procedural issues: whether Baldwin-United can be made a party to the appeal when no final judgment was entered in the trial court against them and whether the motion to dismiss was timely made. Our decision that Baldwin-United was not a necessary party makes it unnecessary to decide these issues.

For the reasons stated herein we reverse the decision of the Court of Appeals, order the motion to dismiss overruled, and remand the case to the Court of Appeals to decide the merits of the appeal.

STEPHENS, C.J., and AKER, GANT, LEIBSON, STEPHENS and VANCE, JJ., concur.

WINTERSHEIMER, J., not sitting.

plaintiff. *Lawrence v. Marks*, Ky., 355 S.W.2d 162 (1962).

OHIO CASUALTY INSURANCE COMPANY, Appellant,

v.

Alfredo CISNEROS, Appellee.

Court of Appeals of Kentucky.

Aug. 26, 1983.

The Circuit Court, Whitley County, J.B. Johnson, Jr., J., entered judgment in favor of insured awarding him no-fault and uninsured motorist benefits, and insurer appealed. The Court of Appeals, Hogge, J., held that: (1) trial court did not err in denying motion for new trial based on presence of a convicted felon on the jury where challenge to qualifications of that juror were not made before jury was impaneled, and (2) defense of fraud was unavailable to insurer in suit for no-fault and uninsured motorist benefits where insurer failed to plead fraud as an affirmative defense.

Affirmed.

1. New Trial ⇐55

Trial court did not err in denying motion for new trial based on presence of a convicted felon on the jury where challenge to qualifications of that juror were not made before jury was impaneled. KRS 29A.080.

2. Jury ⇐110

Statutory section providing that there be no waiver of juror disqualifications is directed to judge in his activities in drawing up a jury list and provides that he cannot waive any of the disqualifications in order to allow a prospective juror to serve. KRS 29A.080(3).

3. Jury ⇐127

Any challenge to qualification of a juror must be made before the jury is impaneled.

Commonwealth Of Kentucky

Court Of Appeals

NO. 87-CA-2067-MR

JOHN M. FOSTER, ET AL. — APPELLANTS

v. — APPEAL FROM ALLEN CIRCUIT COURT
ACTION NO. 84-CI-000032

TRANSPORTATION CABINET, COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS — APPELLEES

* * * * * * * * * * * * * * *

ORDER

BEFORE: LESTER, CLAYTON and COOPER, JUDGES.

This Court, having considered the motion for reconsideration of this Court's order, entered November 16, 1987, dismissing the above-styled appeal, the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: January 21, 1988

Charles B. Lester
JUDGE, COURT OF APPEALS

Supreme Court of Kentucky

87-SC-79-D
(87-CA-2067-MR)

JOHN M. FOSTER and
VIRGINIA S. FOSTER — MOVANTS

V.

ALLEN CIRCUIT COURT
#84-CI-032

G. D. MILLIKEN, JR. — RESPONDENT

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED March 22, 1988.

Robert F. Stephens

Chief Justice

legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7 After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8 If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.

[Amended November 21, 1980.]

PART V. JURISDICTION ON WRIT OF CERTIORARI

RULE 17. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

[Amended effective August 1, 1984.]

RULE 18. CERTIORARI TO A FEDERAL COURT OF APPEALS BEFORE JUDGMENT

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U.S.C. § 2101(e); see also, United States v. Bankers Trust Co., [55 S.Ct. 407] 294 U.S. 240 [79 L.Ed. 885] (1935); Railroad Retirement Board v. Alton R. Co., [55 S.Ct. 758] 295 U.S. 330 [79 L.Ed. 1468] (1935); Rickert Rice Mills v. Fontenot, [56 S.Ct. 374] 297 U.S. 110 [80 L.Ed. 513] (1936); Carter v. Carter Coal Co., [56 S.Ct. 855] 298 U.S. 238 [80 L.Ed. 1160] (1936); Ex parte Quirin, [63 S.Ct. 1] 317 U.S. 1 [87 L.Ed. 3] (1942); United States v. Mine Workers, [67 S.Ct. 677] 330 U.S. 258 [91 L.Ed. 884] (1947); Youngstown Sheet & Tube Co. v. Sawyer, [72 S.Ct. 863] 343 U.S. 579 [96 L.Ed. 1153] (1952); Wilson v. Girard, [77 S.Ct. 1409] 354 U.S. 524 [1 L.Ed.2d 1544] (1957); United States v. Nixon, [94 S.Ct. 3090] 418 U.S. 683 [41 L.Ed.2d 1039] (1974).

RULE 19. REVIEW ON CERTIORARI—HOW SOUGHT—PARTIES

.1 A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the case may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties to the proceeding. Such requests to certify the record prior to action by the Court on the petition for certiorari, however, should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2 When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the

CERTIFICATION

This is to certify that a true copy of the Brief in opposition to Petition for Writ of Certiorari for lact of proper jurisdiction, contents, authorities and appendix were mailed this date to John Foster, Pro Se, 5121 Gallatin Road, Scottsville, Kentucky 42164 and a copy to Hon. John C. Scott, Clerk of the Supreme Court of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

This the 12 day of Aug 1988

G. D. Milliken, Jr.